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(1)

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

JACK GRIFFIN,

Petitioner,

v.

FIRST GIBRALTAR BANK, FSB,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the post-removal intervention of FSLIC's (*pendente lite*) transferee of the claim in a pending federal court suit confer federal jurisdiction when none previously existed due to FSLIC's removal of a state court suit within the proviso of 12 U.S.C. § 1730(k)(1)(C)?

II. Does the amendment of 12 U.S.C. § 1819 by FIRREA apply retroactively to confer federal jurisdiction when none previously existed at the time of removal?

III. Did comprehensive federal legislative enactments subsequent to the Court's decision in *D'Oench, Duhme & Co., Inc. v. FDIC* preempt the common law *D'Oench* estoppel established by such decision?

IV. Does the common law *D'Oench* estoppel extend protection to FSLIC or its transferees as to pre-FIRREA disputes involved in a pending federal suit which was not properly removable because of the proviso of 12 U.S.C. § 1730(k)(1)(C)?

V. Does federal law furnish the rule of decision to pre-FIRREA disputes between FSLIC's (*pendente lite*) transferee and a borrower/creditor of a failed state-chartered savings association embroiled in a pending federal suit (which was within the proviso of 12 U.S.C. § 1730(k)(1)(C) at the time of FSLIC's removal)?

VI. Is a contractual (state) choice of law provision in a contract between a state-chartered savings association and a borrower/creditor thereof enforceable to require application of state law, in preference to federal law, in the resolution of disputes between FSLIC or its transferee

QUESTIONS PRESENTED – Continued

and the borrower/creditor involving such contract or rights thereunder?

VII. Does the impairment of rights under a contract between a state-chartered savings association and a borrower/creditor thereof and the denial of defenses and claims of such borrower/creditor, as a result of federal statutory enactments or other federal common law principles, violate the Fifth Amendment to the United States Constitution?

LIST OF PARTIES

Petitioner: Jack Griffin

Respondent: First Gibraltar Bank, FSB[1]

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[1] The Federal Savings and Loan Insurance Corporation was involved from the date of removal until August 9, 1989, the effective date of FIRREA. Thereafter the Federal Deposit Insurance Corporation as Manager of Federal Savings and Loan Insurance Corporation Resolution Fund, as Receiver for First Texas Savings Association became involved as a party to this suit until the Order of Dismissal was entered on November 20, 1989, reproduced as Appendix J, p. 49a, *infra*.

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In The

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JACK GRIFFIN,

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FIRST GIBRALTAR BANK, FSB,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jack Griffin ("Griffin") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on July 15, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 935 F.2d 691 and is reproduced as Appendix A, p. 1a, *infra*. The Memorandum Opinion and Order of the United States District Court for the Northern

District of Texas, Dallas Division (Sanders, D.J.) has not been reported but is reproduced as Appendix C, p. 27a, *infra*.

JURISDICTION

The opinion of the Court of Appeals was delivered July 15, 1991. See Appendix A, p. 1a, *infra*. The judgment of the Court of Appeals was also entered July 15, 1991. See Appendix B, p. 25a, *infra*. The Order of the Court of Appeals denying Griffin's request for rehearing was entered August 19, 1991. See Appendix F, p. 37a, *infra*. The jurisdiction of the Court to review the judgment of the Fifth Circuit Court of Appeals is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution

Article III, Section 1 of the United States Constitution.

The Fifth Amendment to the United States Constitution.

Statutes

12 U.S.C. §1730(k)(1)

12 U.S.C. §1819

12 U.S.C. §1823(e)

28 U.S.C. §1441

28 U.S.C. §1652

The text of the foregoing constitutional provisions and statutes are reproduced in Appendix K, p. 51a, *infra*.

STATEMENT OF THE CASE

A. Alleged Basis of District Court Jurisdiction

First Texas Savings Association ("First Texas"), a state chartered institution, filed a state court suit against Griffin and Worth Williams ("Williams") in early 1987 seeking recovery upon a guaranty. Griffin and Williams joined issue (raising various state law defenses among which were estoppel, failure of consideration, breach of duties of good faith and fair dealing, breach of fiduciary duty, waiver, unconscionability, set off and usury) and subsequently counterclaimed against First Texas (asserting various state law claims, among which were breach of contract, fraud, usury, partnership and a request for a judicial wind-up of partnership). First Texas joined issue as to the counterclaims. Subsequently, First Texas was declared insolvent on December 27, 1988 and the Federal Savings and Loan Insurance Corporation was appointed its receiver ("FSLIC").

On January 26, 1989, FSLIC removed the pending state court suit to the United States District Court for the Northern District of Texas. FSLIC asserted removal jurisdiction premised on 12 U.S.C. §1730(k)(1) and 28 U.S.C. §1441. See Verified Petition for Removal, reproduced as Appendix G, p. 39a, *infra*. The District Court, presumably accepting FSLIC's jurisdictional assertion, denied Griffin's request for remand premised on an absence of

jurisdiction under the proviso of 12 U.S.C. §1730(k)(1)(C) (the "Proviso"), see Order of May 15, 1989, reproduced as Appendix H, p. 45a, *infra*, which states in relevant part:

> Provided, that any action, suit, or proceeding to which the Corporation (FSLIC) is a party in its capacity as . . . receiver . . . of an insured state-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders and such institution under state law shall not be deemed to arise under the laws of the United States.

Immediately upon FSLIC's appointment, it entered into a purchase and assumption transaction ("P&A") with First Gibraltar Bank, FSB ("First Gibraltar"), a newly chartered federal institution. FSLIC, pursuant to the P&A, allegedly assigned the note and guaranty involved in the state court suit to First Gibraltar at such time. First Gibraltar, almost four (4) months after FSLIC's removal, requested leave to intervene and adopt First Texas' Original Petition. Griffin's opposition to the intervention, asserted in part an absence of jurisdiction because of the Proviso and the decision in *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989). First Gibraltar did not assert an independent basis of jurisdiction, but merely acknowledged that jurisdiction was dependent upon the validity of FSLIC's earlier removal. The District Court granted First Gibraltar leave to intervene and adopt First Texas' Original Petition, thereby overruling Griffin's jurisdictional contest. See Order of July 3, 1989, reproduced as Appendix I, p. 47a, *infra*.

After First Gibraltar's intervention, Griffin again sought a remand based on an absence of jurisdiction under the Proviso or otherwise. The District Court again retained jurisdiction but premised the same on the authority of *Triland Holdings & Co. v. Sunbelt Service Corp.*, 884 F.2d 205 (5th Cir. 1989) and the retroactive application of 12 U.S.C. §1819, as amended in August, 1989 by §209 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") Pub. L. No. 101-73, 103 Stat. 183. The Federal Deposit Insurance Corporation ("FDIC"), after FSLIC's dissolution by FIRREA, urged federal jurisdiction on such grounds in opposition to Griffin's remand request. The District Court denied Griffin's additional request for remand. See Memorandum Opinion and Order of January 17, 1990, reproduced as Appendix C, p. 27a, *infra*.

B. Statement of Background Facts

Griffin and Williams formed Village at Spring Park Joint Venture ("Joint Venture") to purchase and commercially develop certain Dallas real estate. In 1985, the Joint Venture entered into financing agreements with First Texas pursuant to which funds were loaned to the Joint Venture, evidenced by its note. The note was secured by a deed of trust on the real estate purchased and a security interest in other collateral. Griffin and Williams executed a personal guaranty of the Joint Venture's debt.

During 1986, disputes arose regarding the extent and terms of the financing agreements. The disputes intensified, leading First Texas to declare a default and commence non-judicial foreclosure proceedings against the

real estate. In November, 1986, the Joint Venture filed for bankruptcy protection under 11 U.S.C., Chapter 11, which stayed the foreclosure proceedings.

In early 1987, First Texas sued Griffin and Williams in the state court suit on their guaranty. Shortly thereafter, an agreement was reached between the interested parties to lift the automatic stay applicable by reason of the Joint Venture's bankruptcy proceedings and permit First Texas to foreclose the deed of trust. First Texas then held a non-judicial foreclosure sale on May 5, 1987. First Texas, making the highest bid at $3,888,500, became the purchaser of the real estate at such sale. Thereafter, First Texas asserted Griffin's liability for the entire deficiency (the difference between the debt and the foreclosure bid price) in the state court suit. Griffin disputed such claim, contending that a vital part of the agreement to lift stay and permit foreclosure was First Texas' agreement to credit the Joint Venture debt with the amount of the First Texas appraisal ($5,555,000). First Texas, however, disputed the contention and refused to give such credit.

On December 27, 1988, First Texas was declared insolvent and FSLIC appointed its receiver. The same day, FSLIC entered into the P&A with First Gibraltar and allegedly assigned the Joint Venture's note and the guaranty of Griffin and Williams to First Gibraltar pursuant to the P&A. On January 26, 1989, FSLIC removed the state court suit to District Court. Shortly after removal, this Court rendered its decisions in *Coit* and *FSLIC v. Ticktin*, 490 U.S. 82 (1989).

C. Proceedings in the Courts Below

1. State Court Proceedings. The state court suit against Griffin and Williams based on their guaranty sought a judgment for the entire Joint Venture debt. Griffin and Williams joined issue in such suit and vigorously contested their alleged liability. Griffin and Williams counterclaimed against First Texas, asserting state law causes of action. First Texas joined issue on the counterclaims. In March, 1988, Griffin and Williams amended their counterclaims to add a complaint regarding First Texas' refusal to credit the Joint Venture debt with the appraisal amount. Williams filed for personal bankruptcy and was non-suited by First Texas in June, 1988.

2. District Court Proceedings. FSLIC'S January 26, 1989 removal of the state court suit was pre-*Coit*. In traditional fashion, FSLIC's announced plan was to seek dismissal of Griffin's counterclaim on the authority of *North Mississippi Sav. & Loan Ass'n v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). However, FSLIC did not seek dismissal under *Hudspeth* and apparently abandoned such plan in light of *Coit*. Griffin, on the strength of *Coit*, filed a Motion for Remand asserting the absence of subject matter jurisdiction because the Proviso applied to the case. FSLIC opposed remand, contesting the relevance of *Coit* and applicability of the Proviso. The District Court, presumably adopting FSLIC's position, denied Griffin's Motion for Remand by Order of May 15, 1989, reproduced as Appendix H, p. 45a, *infra*.

After the effective date of FIRREA, the FDIC was dismissed from the suit by agreement of FDIC and Griffin. See Order of November 21, 1989, reproduced as Appendix J, p. 49a, *infra*.

First Gibraltar pursued summary judgment proceedings, which Griffin timely opposed. In due course, the District Court granted summary judgment in favor of First Gibraltar against Griffin denying Griffin's defenses and counterclaims. See Memorandum Opinion and Order of February 7, 1990, reproduced as Appendix C, p. 27a, *infra*. The District Court denied Griffin's Motion for New Trial by Order of April 4, 1990, reproduced as Appendix E, p. 35a, *infra*.

3. Fifth Circuit Proceedings. In his appeal, Griffin again contested jurisdiction because of the Proviso, the inapplicability of *Triland* and the improper retroactive application of FIRREA. Griffin also argued preemption of the common law estoppel doctrine established by this Court in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447 (1942) by Congressional enactments affecting 12 U.S.C. §1823(e). In addition, Griffin argued that a *D'Oench* estoppel and the benefits of §1823(e) were only available to the FDIC and any other entities specifically designated by Congress, which did not include FSLIC or First Gibraltar, its transferee. Griffin further argued that valid contractual provisions and rights were unconstitutionally impaired by changes in the applicable rule of decision, application of a *D'Oench* estoppel, deprivation of claims and defenses and a retroactive application of FIRREA.

The Court of Appeals rejected Griffin's arguments, holding in material part, that (a) removal jurisdiction was proper under §1730(k)(1) since FSLIC was a party and the case arose under the laws of the United States, (b) the Proviso was inapplicable because of the presence of First Gibraltar, a non-Proviso party, (c) even in the absence of jurisdiction under §1730(k)(1), 12 U.S.C. §1819, as amended by §209 of FIRREA in August, 1989, retroactively applied to validate FSLIC's removal seven (7) months earlier, (d) the federal rule of decision rather than state law applied to the case since it arose under the laws of the United States, (e) no contractual or property rights of Griffin were improperly impaired, (f) §1823(e) does not preempt the common law *D'Oench* estoppel, (g) a *D'Oench* estoppel applies to benefit FSLIC or First Gibraltar, its transferee, (h) application of a *D'Oench* estoppel against Griffin was proper and did not effect an unconstitutional deprivation of property without compensation or result in a denial of procedural due process, and (i) FSLIC or First Gibraltar, its transferee, was permissibly entitled to disregard otherwise valid provisions contained in the very agreements enforced against Griffin. The Court of Appeals further upheld the denial of Griffin's state law defenses and counterclaims based upon partnership, usury, breach of contract and wrongful foreclosure, thereby affirming the award of a money judgment in favor of First Gibraltar against Griffin.

REASONS FOR GRANTING THE WRIT

I. This Petition Raises Issues Of Exceptional Importance.

This is a case of national importance. At stake is the proper judicial treatment of millions (maybe billions) of dollars of creditor claims against failed savings institutions and certain defenses to claims asserted either by such failed institutions, FSLIC, FDIC or other transferees of the assets previously held by such failed institutions, likewise totalling in the billions.

The federal judicial arena became and remains the focal point of most of the battles. In dealing with such cases, it was imperative that the federal judiciary assure fidelity to constitutional principles, employ and rely upon *stare decisis*, recognize and observe federal jurisdictional and juridical limitations and apply the appropriate rule of decision to resolve such disputes. To date, thousands of litigants embroiled in a massive number of suits have been deprived of any meaningful redress because courts of appeal and district courts within the federal judicial system departed from one or more of these tenets.

The number of closures, receiverships, suits by or against the failed institutions or the transferees of their assets, the dollars in dispute or the out-of-pocket cost of all such matters are unknown to Griffin. Without doubt, the numbers are substantial and the cost thereof is staggering. It is doubtful that any single person or branch of government has a definitive grasp of the enormity of these matters.

The Court's holding in *D'Oench* was a simple, straightforward, well-reasoned decision formulating a necessary remedy in the tradition of the common law to fill a gap in the relevant legislative scheme. The Court unmistakenly held that, as a matter of federal public policy, lending oneself to a secret or undisclosed scheme or arrangement whereby the banking authority (FDIC corporate) was, or was likely to be, misled precluded assertion of such scheme or arrangement as a defense to the FDIC's claim of liability thereon. *D'Oench*, 315 U.S. at 457-461. An estoppel was the equitably fashioned common law remedy used to meet the need addressed by *D'Oench*. *Id.* at 459.

D'Oench was decided in 1942. Thereafter, Congress enacted the Federal Deposit Insurance Act of 1950, 64 Stat. 889, a comprehensive legislative scheme. A portion of such act specifically addressed issues of validity and enforceability of agreements with financial institutions insured by the FDIC, which agreements affected assets acquired by the FDIC in its corporate capacity under the law. The act specified essential requisites for such agreements. See 12 U.S.C. §1823(e), pre-*Firrea*, Appendix K, p. 56a, *infra*. Subsequently, extensive legislative changes affecting both the banking and thrift industries were made by enactment of the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982), another comprehensive legislative effort. This act not only expanded the operations and powers of both FDIC and FSLIC, favoring the FDIC but it also addressed the issue of the validity and enforceability of agreements with a failed bank. W. Robert Gray critiques the effect of

the Federal Deposit Insurance Act and the changes effected by Garn-St. Germain in the article entitled *Limitations On The FDIC's D'Oench Doctrine Of Federal Common-Law Estoppel: Congressional Preemption And Authoritative Statutory Construction*, 31 S. Tex. L. Rev. 245 (1990).

In the years since *D'Oench*, numerous courts of appeal and district courts within the federal judicial system have systematically applied the *D'Oench* estoppel doctrine in diverse situations, seemingly expanding such principle or developing others with similar characteristics for application along the way. Such expansive judicial efforts occurred, unaffected by intervening Congressional enactments or other established principles which normally restricted federal jurisdiction or required judicial restraint. In most instances, the lower federal courts exercised subject matter jurisdiction over the disputes and applied federal rules of decision thereto, all the while formulating or extending such principles, even at the very time of their application. This fervent effort occurred under the banner of "the policy." Some representative Fifth Circuit decisions reflective of judicial actions of such type are mentioned: (1) *Beighley v. FDIC*, 868 F.2d 776, 783-84 (5th Cir. 1989) (judicially extended a *D'Oench* estoppel pre-FIRREA to benefit FDIC in a receivership rather than a corporate capacity); (2) *Bell & Murphy & Assoc., Inc. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 754-55 (5th Cir. 1990) *cert. denied*, ___ U.S. ___, 11 S.Ct. 244, 112 L. Ed. 2d 203 (1990) (judicially extended a *D'Oench* estoppel to benefit a bridge bank created by FDIC and to whom FDIC transferred the failed bank's assets); (3) *FSLIC v. Murray*, 853 F.2d 1251, 1254, 1256 (5th Cir. 1988); (judicially extended a *D'Oench* estoppel to

benefit FSLIC and judicially adopted or formulated and applied a federal common law holder in due course principle to benefit FSLIC); (4) *Porras v. Petroplex Savings Ass'n*, 903 F.2d 379, 381 (5th Cir. 1990) (judicially extended a *D'Oench* estoppel to benefit a private transferee of FSLIC); (5) *FDIC v. McClanahan*, 795 F.2d 512, 516 (5th Cir. 1986) (formulated and applied a contributory negligence standard to a borrower, with preclusive effect analogous to a negligence *per se* standard, to prohibit defenses or claims as a result of dealings with the failed institution); (6) *Pernie Bailey Drilling Co. v. FDIC*, 905 F.2d 78, 80 (5th Cir. 1990) (sanctioned contracts between FSLIC or FDIC with third parties which purported to transfer most assets – usually notes or guaranties – to the third party, yet the liabilities of the failed institution arising out of the transactions evidenced by such assets were retained by FSLIC or FDIC; the structure was used to prevent or avoid the assertion or application of various defenses in suits seeking recovery on the transferred assets).

One can't help but wonder if the morass of federal litigation has been prompted by a perception that the federal forum insures a judicial advantage to the possessors of the failed entities' assets. Such a perception would certainly be fostered by the aggressive formulation, extension and application of preclusive principles by the courts.

Regrettably, what started out as a necessary remedy, restrictively formulated through the inherent power of the Court in the common law tradition, carefully employed to prevent an injustice and foster an acknowledged public policy, has gone awry. The proliferation of

reported decisions, burgeoning case load and militant judicial expansionism of the *D'Oench* estoppel principle and similar developments by certain federal courts truly boggles the mind. The milieu is reminiscent of the fabled act of Dr. Frankenstein, whose noble creation rebelled, rising from the laboratory table and embarking on an unrestricted journey of its own, wreaking total pandemonium.

Griffin believes the issues presented by this petition go well beyond the rights of the parties in the case and affect the fundamental rights of numerous parties similarly situated nationwide.

II. The Fifth Circuit Substantially Departed From The Accepted And Usual Course of Judicial Proceedings by Determining That Subject Matter Jurisdiction Of The Removed State Court Suit Exists Under §1730(k)(1) Based Upon Undisputed Post-Removal Events, Which Determination Conflicts With Established Decisions Of The Supreme Court And Courts of Appeals.

The Fifth Circuit upheld federal subject matter jurisdiction under §1730(k)(1), concluding that the "case arises under the laws of the United States because FSLIC was a party at the time of removal" and the Proviso was not applicable "because of the presence of 'non-proviso' parties", namely First Gibraltar. (935 F.2d at 695; Appendix A, p. 4a, *infra*). The ruling ignores undisputed facts set forth in the opinion and creates an apparent conflict with Supreme Court and Courts of Appeals decisions on the same matter of law.

A. Section 1730(k)(1) Jurisdiction.

Proper removal jurisdiction under §1730(k)(1) could only arise if FSLIC was a party to a state court suit and the Proviso was inapplicable. Obviously, FSLIC is an agency of the United States within the meaning of Clause (A) of such statute. *Ticktin*, 490 U.S. at 85. However, FSLIC did not "commence" the present action in the district court subsequent to its appointment. As a consequence, jurisdiction was not invoked under some other federal statute working in tandem with §1730(k)(1)(A), as was the case in *Ticktin*. *Id.* FSLIC's jurisdictional contention under §1730(k)(1), while failing to specify the particular clauses invoked, can only refer to Clause (B) and the initial portion of Clause (C), in tandem.

B. Contradictory Holding By Fifth Circuit.

The Fifth Circuit herein recognized that at the time of removal (January 26, 1989), FSLIC and Griffin were the only parties in the suit and that First Gibraltar did not intervene until July 3, 1989 (935 F.2d at 694, Appendix A; p. 4a, *infra*). The Fifth Circuit also recognized the established rule that the power to remove is evaluated "at the time of removal." (935 F.2d at 696; Appendix A, p. 7a, *infra*). Despite express recognition of such undisputed facts and the applicable rule, the Fifth Circuit concluded that First Gibraltar's post-removal intervention almost six (6) months after removal somehow rendered it a "non-proviso" party at the time of removal thereby preventing application of the Proviso. The contradiction in such ruling is readily apparent.

C. Holding By Fifth Circuit Conflicts With Established Decisions.

This Court recognized the validity of the Proviso and its investiture of jurisdiction in the state courts to deal with issues remarkably similar to these herein. *Coit*, 489 U.S. 561, 577. Long-standing and irrefutable precedent clearly establishes that the proper time to determine the validity and propriety of a removal is by evaluating the facts that exist at the time of such removal. *Pullman Company v. Jenkins*, 304 U.S. 534, 537 (1939); *Beighley v. FDIC*, 868 F.2d at 780, citing *In re: Carter*, 618 F.2d 1093, 1101 (5th Cir. 1980) *cert. denied* sub. nom. *Sheet Metal Workers Int'l Assn. v. Carter*, 450 U.S. 949 (1981); *Medlin v. Bowen Vertol Co.*, 620 F.2d 957, 963 (3rd Cir. 1980); *Westmoreland Hosp. Ass'n v. Blue Cross, etc.*, 605 F.2d 119, 123 (7th Cir. 1979) *cert. denied* 444 U.S. 1077 (1980); Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* §3721 at 209 (2nd ed. 1985).

The Fifth Circuit chose to ignore established precedent and uphold jurisdiction as the result of First Gibraltar's belated intervention almost six (6) months after removal. The Fifth Circuit's departure from and disregard of established precedent requires that this Court exercise its power of supervision to correct such actions since jurisdiction did not exist at the time of removal because of the Proviso.

III. The Fifth Circuit Substantially Departed From The Accepted And Usual Course of Judicial Proceedings by Determining That Subject Matter Jurisdiction Of The Removed State Court Suit Exists Because Of the Retroactive Application of §1819, As Amended By FIRREA Based Upon Undisputed Post-Removal Events, Which Determination Conflicts With Established Decisions Of The Supreme Court And Courts of Appeals.

Even if the Proviso applied, the Fifth Circuit alternatively held that §1819, as amended by §209 of FIRREA, applied retroactively to confer federal subject matter jurisdiction (935 F.2d at 695, Appendix A, p. 7a, *infra*). A recent holding of the Seventh Circuit is to the same effect. *FDIC v. Wright*, 942 F.2d 1089 (7th Cir. 1991). Such retroactive application of §1819 conflicts with this Court's decisions in *Kaiser Aluminum Chemical Corporation v. Bonjorno*, 494 U.S. 827, 110 S.Ct. 1570 (1990) and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). In *Kaiser* and *Bowen*, this Court held that retroactive application of a statute is not favored absent express legislative authorization. 110 S.Ct. at 1576; 488 U.S. at 471. See also, *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985); *Green v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944); *Union Pacific Railroad Co. v. Laramie Stockyards Co.*, 231 U.S. 190 (1913). Section 1819, as amended by FIRREA, does not provide for retroactive application, nor can such construction by derived from the legislative history of FIRREA. See *Wright*, 942 F.2d at 1095. Thus §1730(k)(1)(C), the law in effect at the time of removal, must be given effect. This result is in harmony with the equally established precedent requiring the propriety of removal to be tested at the

time the petition for removal is filed. See discussion under Subsection II. C., *supra*, p. 16. Since jurisdiction did not exist at the time of removal, the Fifth Circuit's departure from and disregard of established precedent requires that this Court exercise its power of supervision to correct such action.

IV. The Fifth Circuit Incorrectly Applied Federal Statutes.

Important issues regarding the proper application of certain statutes of the United States exist. The first deals with federal legislative preemption of a judicially formulated common law *D'Oench* estoppel. The second deals with determining the proper law to resolve pre-FIRREA disputes involved in a suit within the Proviso.

A. Preemption of the *D'Oench* Estoppel.

The Fifth Circuit determined that §1823(e), as it existed pre-FIRREA, did not preempt the federal common law *D'Oench* estoppel (935 F.2d at 698, Appendix A, P. 13a, *infra*). Griffin contended preemption had occurred by reason of Congressional enactment of certain comprehensive legislative schemes. Preemption would eliminate the common law *D'Oench* estoppel as an available remedy for application by the courts. It would also preclude extension of the common law *D'Oench* estoppel to benefit FSLIC and its transferees.

This Court has spoken pointedly to the preemption of judicially formulated common law rules by subsequent legislative enactment. Although, established by the

express authorization of Article III, Section 1 of the Constitution, this Court unequivocally recognized that "federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been invested with open-ended lawmaking powers." *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 95 (1981). The Court further observed that "we consistently have emphasized that the federal lawmaking power is vested in the legislative, not the judicial branch of government; therefore, federal common law is 'subject to the paramount authority if Congress'. [citation omitted]." *Id.*

The Court recognized that the ultimate responsibility for prescribing the federal standard rests in the Congress. "Federal courts, unlike state courts, are not common-law courts and do not possess a general power to develop and apply their own rules of decision. [citations omitted] The enactment of a federal rule in an area of national concern, and the decision of whether to displace a state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress. [citation omitted]." *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-313 (1981). The Court further acknowledged that "federal common law is 'subject to the paramount authority of Congress' [citation omitted]. It is resorted to '[i]n absence of an applicable act of Congress' [citation omitted] and because the court is compelled to consider federal questions 'which cannot be answered from federal statutes alone' [citation omitted]. Federal common law is a 'necessary expedient' [citation omitted] and *when Congress addresses a question previously governed by a decision*

rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." Id. at 313, 314. (Emphasis supplied). The court then confirmed that the *"federal common law applies '[u]ntil the field has been made the subject of comprehensive legislation . . . ' " Id.* at 314. (Emphasis supplied).

The relevant question with respect to the preemption issue is whether a Congressional legislative enactment has spoken directly to the question addressed by the *D'Oench* estoppel. *City of Milwaukee v. Illinois,* 451 U.S. at 315; Gray, *Limitations On The FDIC's D'Oench Doctrine Of Federal Common-Law Estoppel: Congressional Preemption And Authoritative Statutory Construction,* 31 S. Tex. L. Rev. 245 (1990). Both the Federal Depository Act of 1950 and the Garn-St. Germain Depository Institutions Act of 1982 were comprehensive legislative enactments which addressed §1823(e) and dealt with specific requisites to validate agreements with a failed bank in order to permit their enforcement against the FDIC. *Id.* The absolute necessity to comply with the statute enacted by Congress to deal with matters affected by the *D'Oench* estoppel has been recognized by the Court. See *Langley v. FDIC,* 484 U.S. 86 (1987).

A reasonable analysis of the comprehensive nature of the legislative enactments coupled with the recognition that each addresses the very subject of the *D'Oench* estoppel can lead to only one reasonable conclusion, Congress preempted the common law *D'Oench* estoppel. It must be presumed that Congress declined to fashion a rule regarding such agreements other than that expressed in §1823(e); to do otherwise would be an improper judicial

act. *Northwest*, 451 U.S. at 97; *City of Milwaukee*, 451 U.S. at 319. By reason thereof, the remedy which must be applied is that reflected in the supervening enactment, which displaces the previously formulated common law rule.

The Fifth Circuit previously addressed the preemption of the *D'Oench* estoppel by enactment of §1823(3). See, *FDIC v. McClanahan*, 795 F.2d at 514, n.1. In *McClanahan*, the Fifth Circuit extended *D'Oench* estoppel protection to the FDIC in its receivership capacity by holding that the enactment of §1823(e) did not preempt it. *Id.* The Fifth Circuit relied on the legislative history associated with the enactment of §1823(e) which does not mention the case of *D'Oench*. *Id.* The Fifth Circuit inferred that the enactment of §1823(e) was unrelated to the Supreme Court's holding in *D'Oench* and there was no reason to forbid (application of the) rule of *D'Oench* estoppel to the FDIC in its receivership capacity.

In the present case, the Fifth Circuit recognized that the enactment of §1823(e) was a codification of the *D'Oench* estoppel. (935 F.2d at 698, Appendix A, p. 11a, *infra*). The Fifth Circuit apparently has adopted contradictory positions holding that the common law *D'Oench* estoppel coexists with §1823(e), despite its recognition that the statute codified the common law rule. The Fifth Circuit's holding cannot be reconciled with *Northwest*, 457 U.S. at 97, and *City of Milwaukee*, 451 U.S. at 317. It is nothing more than improper judicial legislation.

Judicial extension of the common law *D'Oench* estoppel to benefit FSLIC and its transferees is precluded by

the same principles and authorities. If legislatively preempted, the rule is no longer available for judicial application. Furthermore, utilization, extension or application in such a circumstance clearly constitutes an impermissible fashioning of a remedy which Congress decided not to adopt. *Northwest*, 451 U.S. at 97.

B. State Law Applicable To Resolve Disputes.

Was the Court's decision in *Coit* a mere advisory opinion, or an exercise in mootness with little value as precedent? Although Griffin does not believe such to be the case, he is a distinct minority in the federal judicial system generally and in the federal courts of the Fifth Circuit specifically. The Fifth Circuit Court of Appeals, taking a somewhat parochial view of *Coit*, held it to merely deal with an exhaustion of remedies issue and politely derided Griffin's reliance thereon. (935 F.2d at 695, n.2, Appendix A., p.6a, *infra*.) *Coit* assuredly addressed the exhaustion of remedies issue, but it did much, much more. It recognized the validity and enforceability of a borrower/creditor's state law claims against FSLIC, as receiver of failed savings associations. It affirmed the validity and application of the Proviso to invest state courts with jurisdiction of suits involving the state law claims of such type against FSLIC. It recognized that state law claims for usury, partnership, breach of oral commitments and loan agreements, breach of fiduciary duties and implied duties of good faith and fair dealing and declaratory relief rendering the note in suit unenforceable – state law claims asserted by Coit Independence Joint Venture against FSLIC as receiver of a failed *federally* chartered savings association – were cognizable and assertable. If a common law *D'Oench*, estoppel applied

to render Coit Independence's claims inapplicable or ineffective, *Coit* has a severely limited application.

Prior to *Coit*, improper removals followed by summary dismissals of claims flourished, premised on the rationale of *Hudspeth*. Since *Coit*, the removals persist but the practice is to apply federal law, thereby *"D'Oenching"* claims and defenses, or application of something else akin thereto as the result of a judicially formulated extension of a federal principle. It is equally as wrong as the *Hudspeth* procedures.

The Fifth Circuit deemed federal law applicable to the matters involved in the case (935 F.2d at 695-96, 698, Appendix A, p. 5a, 8a, 12a, *infra*). This resulted from its conclusion that federal subject mater jurisdiction existed (by reason of §1730(k)(1) or FIRREA) and the matters involved herein arose under the laws of the United States. Griffin clearly demonstrated that the applicable statutes provide to the contrary. The Proviso expressly provides that in those instances where FSLIC, as receiver of a state-chartered institution, is a party to a suit which involves only the rights of creditors and such institution under state law, *such does not arise under the laws of the United States*. The effect of the Proviso is obvious, there was no right of removal. It could not be put more clearly – no federal question jurisdiction, no federal rule of decision. There was no federal jurisdiction and, therefore, the state law governs. 28 U.S.C. §1652; *Erie Ry. Co. v. Tompkins*, 304 U.S. 64, 78.

V. Constitutional Argument.

The Fifth Circuit summarily dismissed Griffin's constitutional chalienges regarding the effect of various actions upon his vested contract and legal rights (935 F.2d

at 698-99, Appendix A, p. 13a, 15a, *infra*). In summary, the Fifth Circuit (a) refused to apply the contractual (state) choice of law provision, ruling instead that federal law applied and provided the rule of decision (935 F.2d at 698, Appendix A, p. 12a, *infra*); (b) held that otherwise valid contractual provisions between private parties cannot preclude application of a *D'Oench* estoppel; *Id.*, (c) ruled that FSLIC or First Gibraltar could validly disregard application of the contractual (state) choice of law provision and such was neither improper nor inequitable conduct; *Id.*, (d) held that First Gibraltar, a transferee of FSLIC, was not bound by the contractual (state) choice of law provision; *Id.*, (Appendix A, p. 13a, *infra*) and (e) rendered some of Griffin's defenses and claims meaningless. The basis for such action was application of federal law, including a *D'Oench* estoppel. The Fifth Circuit's position violates the Due Process Clause.

Granted, the contracts are facially between First Texas and Griffin. FSLIC had more than a passing connection with such contracts, however, providing insurance to the institution and possessing contingent rights to the contracts, depending upon the manner of assistance provided upon closure, payment of insured liabilities or otherwise as agreed with First Texas. FSLIC succeeded to the rights of First Texas, though ever so briefly, at the moment of closure. Because of FSLIC's relationship to First Texas, efforts were successfully made by FSLIC and First Gibraltar, its transferee, to claim or assert the benefit of various federally established rights, remedies and rules to Griffin's detriment.

Some might argue that FSLIC, an agency of the United States, is a party of one type or another to the

contracts. Maybe FSLIC was in privity with Griffin when it ever so briefly succeeded First Texas in ownership of the contract. First Gibraltar found itself in a similar position because of the contract transfers from FSLIC. The relationship of FSLIC to First Texas, the nature of the contract and the succession of FSLIC and First Gibraltar may well make either or both something other than strangers to the contract.

From inception of the transaction between First Texas and Griffin, the contract has provided contractual (state) choice of law provisions. The initial commitment by First Texas contained such a position, Appendix L, p. 58a, *infra*. The guaranty likewise has such a provision, Appendix L, p. 58a, *infra*. Such provisions are valid and enforceable under Texas law. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677-79 (Tex. 1990). Whether the contract was only between First Texas and Griffin, or was of such a nature as to render FSLIC a party thereto, or was assigned to FSLIC or its transferee, is immaterial. If the contract is only between private parties, the contractual (state) choice of law provision is unquestionably valid and binding. If FSLIC, an agency of the United States, was a party, its "rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 579 (1934). Even contracts of the United States or its agencies, like those between individuals or corporations, are binding and enforceable. *Id.* at 580.

Contracts and rights thereunder constitute property in a Due Process context. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984); *Lynch*, 292 U.S. at 580. Rights

against the United States arising out of contract are protected by the Fifth Amendment. *Id.* at 581. Griffin's vested contractual and legal rights are clearly protected by the Due Process Clause of the Fifth Amendment. Appendix K, p. 57a, *infra*; *Lynch v. United States*, 292 U.S. at 579. The sanctity of such contractual provisions together with the rights accruing to Griffin thereunder cannot be denied without violating the Due Process Clause.

Since the *D'Oench* estoppel is judicially formulated in a federal forum to fill a federal legislative gap, such should not affect Griffin's constitutional rights. The limited right to formulate the common law *D'Oench* estoppel was a permissible quasi-legislative act, for the express purpose of complementing an existing federal statutory scheme. The primary purpose being legislative in character, no substantial difference exists between the judicial formulation and an express Congressional enactment. If it is used to impair or take the rights and property of Griffin, a Due Process violation is effected thereby just as surely as if done by legislative act.

The goal of the *D'Oench* estoppel and the various statutory enactments is to minimize public expense. The extension of such principles or the formulation of new ones has a similar goal, whether the direct beneficiary is FSLIC, FDIC, the transferees of such entities or some other designee. The impairment or taking achieved thereby, whether through the disallowance of contractual provisions, denial of defenses or denial of affirmative claims, causes just as much injury and damage as if cash or tangible property is affected. The taking or impairment

is just as wrongful and is protected by the Fifth Amendment. *Lynch*, 292 U.S. at 579-581.

Even more serious problems exist to the extent vested rights are taken or contracts impaired to benefit the transferees, which are private, non-governmental entities. Doubt exists regarding the validity of the basic right to take or impair in such instances. Such concern is obviously present here because First Gibraltar seeks the benefit of all such matters.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

THE FEDERAL SAVINGS & LOAN INSURANCE CORP., ETC.,

Plaintiff

and

FIRST GIBRALTAR BANK, FSB.,

Intervenor-Appellee

v.

JACK GRIFFIN,

Defendant-Appellant

No. 90-1301

935 F.2d 691

United States Court of Appeals
Fifth Circuit

July 15, 1991

Appeal from the United States District Court for the Northern District of Texas.

Before JOHNSON, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Intervenor-appellee First Gilbraltar Bank, FSB ("First Gibraltar") seeks to recover under a guaranty executed by defendant-appellant Jack Griffin. The district court granted summary judgment in favor of First Gibraltar. Griffin appeals, claiming breach of other agreements and other matters.

FACTS

Griffin began an unsuccessful attempt to make money in Dallas real estate in 1985 when he and Worth Williams formed a joint venture named Village at Spring Park Joint Venture ("joint venture"). Griffin and Williams approached First Texas Savings Association ("First Texas") about the possibility of a loan for the joint venture. Griffin and Williams sought financing in the three stages: purchase and planning, construction, and permanent financing. On July 11, 1985, First Texas agreed to fund the first phase and loaned 5.6 million dollars to the joint venture. A deed of trust and security agreement covering certain real property in Dallas secured the promissory note. Concurrently with execution of the note, Griffin and Williams executed and delivered a guaranty in favor of First Texas, by which they unconditionally guaranteed the prompt payment of the note in an amount limited as set out in the guaranty. First Texas had an option to finance the next two stages of the project.

Like many businesses in Texas real estate, the joint venture fell upon hard times in 1986. First Texas added to the joint venture's troubles by refusing to exercise its option to supply construction financing. The joint venture subsequently failed to fulfill its obligations under the note. By letter dated October 9, 1986, First Texas notified the joint venture, Griffin and Williams of default under the note. Payment of amounts due was demanded, and notice was given of intention to accelerate the note if the default was not cured by noon on October 14, 1986. The joint venture failed to cure the default. By letter dated October 14, 1986, First Texas gave notice that it was accelerating the note and also notice of a substitute

trustee's sale of the property described in the deed of trust. On November 4, 1986, the joint venture, which held title to the property, filed for federal bankruptcy protection under Chapter 11. An automatic stay prevented the foreclosure sale of the property.

In March 1987, First Texas filed suit in state court against Griffin and Williams on the basis of the guaranty the two had executed. The federal bankruptcy court subsequently modified the automatic stay, which had been protecting the joint venture, and the court permitted a foreclosure sale. First Texas gave notice of substitute trustee's sale by letter dated April 13, 1987. First Texas purchased the property at the sale for $3,888,500.

The state court suit against Williams and Griffin continued for the deficiency due under the promissory note. Williams was subsequently dismissed from the case after he filed for bankruptcy protection.

First Texas itself fell into financial difficulties. On December 27, 1988, the Federal Home Loan Bank Board ("FHLBB") placed First Texas in receivership and appointed Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver. The Texas Savings and Loan Commissioner concurred that grounds existed for authorizing appointment of FSLIC as receiver for First Texas. Once it became receiver, FSLIC automatically succeeded to all of First Texas' assets and liabilities. Shortly thereafter, FSLIC entered into a purchase and assumption agreement with First Gibraltar, a newly chartered federal institution. First Gibraltar purchased substantially all of First Texas' assets and assumed the deposit and secured liabilities of First Texas.

On January 26, 1989, FSLIC removed the suit against Griffin to federal court. First Gibraltar intervened on July 3, 1989. On November 21, 1989, the district court granted Griffin's motion to dismiss without prejudice his counterclaims against Federal Deposit Insurance Corporation ("FDIC"), which had succeeded FSLIC as receiver of First Texas. The only parties to this appeal are First Gibraltar and Griffin. Having assigned the guaranty and the promissory note to First Gibraltar, FDIC as receiver for First Texas is apparently no longer pursuing any claims against Griffin.

In federal district court, Griffin asserted four affirmative defenses to defeat his liability under the guaranty: breach of partnership duties, usury, wrongful foreclosure of property and breach of agreement to fund.[1] First Gibraltar asserts that the defenses are barred by the doctrine established in *D'Oench Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). That doctrine protects the FDIC and FSLIC from unrecorded side agreements not reflected in the bank's records. First Gibraltar also asserts that the defenses are barred by state law. The district court agreed that Griffin was liable under the guaranty in spite of his claimed defenses. We affirm.

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[1] The counterclaims Griffin asserted against FDIC were also breach of partnership duties, usury, wrongful foreclosure of property, and breach of agreement to fund.

DISCUSSION

I. REMOVAL

Griffin first appeals on the ground that federal courts lack subject matter jurisdiction over this case and that therefore the district court should have remanded the case to state court.

FSLIC removed this suit to federal court pursuant to 12 U.S.C. § 1730(k)(1). Under this section, FSLIC can remove to federal court any action to which it is a party. Such action is deemed by § 1730(k)(1) to "arise under the laws of the United States." A proviso excepts from the statute's general grant of federal jurisdiction cases that meet two conditions: (1) only rights or obligations of investors, creditors, stockholders, and a state-chartered institution in FSLIC receivership or conservatorship are at issue, *and* (2) only questions of state law are involved. Griffin argues that the proviso applies to this case, that § 1730(k)(1) is thus inapplicable, and that no other grounds for removal remain.

According to § 1730(k)(1), this case arises under the laws of the United States because FSLIC was a party at the time of removal. Federal subject matter jurisdiction therefore exists. The proviso is not applicable because of the presence of "non-proviso" parties. First Gibraltar, a newly chartered federal institution, is a non-proviso party. *See Bean v. Independent Am. Sav. Ass'n*, 838 F.2d 739, 742 (5th Cir. 1988); *Andrew D. Taylor Trust v. Security Trust Fed. Sav. and Loan Ass'n*, 844 F.2d 337, 341 (6th Cir. 1988); *North Mississippi Sav. & Loan Ass'n v. Hudspeth*, 756 F.2d

1096, 1100 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986).[2]

Even if § 1730(k)(1) did not provide federal subject matter jurisdiction, the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) would. Section 407 of FIRREA repealed 12 U.S.C. § 1730(k)(1), and § 209 amended 12 U.S.C. § 1819. Section 1819 now provides that federal courts have jurisdiction over suits in which the FDIC is a party except when the FDIC is appointed *exclusively* by state authorities *and* when the case involves certain types of state law claims. The exception to § 1819 is not applicable here because state authorities did not exclusively appoint FSLIC as a receiver. FHLBB, a federal agency, appointed FSLIC as receiver. FDIC later replaced FSLIC as receiver because FIRREA transferred FSLIC's functions to FDIC.

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[2] The Supreme Court in *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corp.*, 489 U.S. 561, 109 S.Ct. 1361, 103 L.Ed.2d 602 (1989) effectively overruled one of our holdings in *Hudspeth*. In *Hudspeth*, we ruled that federal statutes required exhaustion of administrative remedies before pursuit in federal court of claims against failed savings and loan institutions in FSLIC receivership. The Supreme Court disagreed, holding that FSLIC did not have the power as receiver to require parties to adjudicate their claims first through the FSLIC claims procedure. The issue presented in *Coit* is not before us.

Griffin nevertheless relies on *Coit* extensively in his appeal, primarily asserting that *Coit* stands for the proposition that state law applies to this case. *Coit* does not in any manner limit or affect the application of *D'Oench Duhme* to Griffin's claims, nor the application of federal jurisdiction to Griffin's claims.

Amended § 1819 applies here even though FIRREA became law after removal and even though FSLIC removed this case. Section 1819 applies retroactively to cure any possible jurisdictional defect in either FSLIC's or FDIC's removal. *Triland Holdings & Co. v. Sunbelt Services Corp.*, 884 F.2d 205, 207 (5th Cir. 1989); *accord Sunbelt Sav., FSB v. Bent Trail Phase IV Joint Venture*, 907 F.2d 1569, 1571 (5th Cir. 1990); *Pernie Bailey Drilling Co. v. Federal Deposit Ins. Corp.*, 905 F.2d 78, 80 (5th Cir. 1990) (per curiam). Since FSLIC was a party at the time of removal and since § 1819 applies retroactively to cure any possible defects at the time of FSLIC's removal, § 1819 unmistakably confers federal jurisdiction in this case. *Triland*, 884 F.2d at 207.

Griffin tries to distinguish *Triland* and its progeny on the ground that FSLIC was still a party at the time of appeal in *Triland* and here neither FSLIC or [sic] FDIC is still a party. For this reason, Griffin urges, amended § 1819 should not apply retroactively to his case. This fact does not negate the applicability of *Triland*. The power to remove is evaluated at the time of removal. The dismissal of one of the parties by the time of the appeal does not affect the propriety of removal. Congress enacted FIRREA to correct any possible jurisdictional defects existing at the time of removal; the fact that neither FSLIC or [sic] FDIC is a party at the time of appeal cannot defeat this intent.

Further, we can conclude that Congress did not intend the result Griffin urges. The policy reasons for insuring federal jurisdiction over cases involving the actions of failed thrifts continue when the FDIC is voluntarily dismissed as a party and the owner of the failed thrift's assets remains. A transferee from FSLIC or FDIC,

as successor of their interests, is still entitled to the protection of federal courts applying *D'Oench Duhme*, even when FSLIC or FDIC is voluntarily dismissed. In sum, federal jurisdiction is proper in this case because according to repealed § 1730(k)(1) or amended § 1819, the case arises under federal law. Since federal question jurisdiction exists, federal law applies.

In the alternative, Griffin argues that FSLIC was not a proper party so FSLIC could not remove the case under repealed § 1730(k)(1) or current § 1819. Specifically, he contends that FSLIC did not own any cause of action against Griffin, having assigned the guaranty and the promissory note to First Gibraltar, and thus could not be a proper party.

Griffin had asserted four counterclaims against FDIC as receiver for First Texas and sought a money judgment. If he had succeeded, he would have become a general unsecured creditor of First Texas. The claims of the general unsecured creditors remained a liability of FDIC. Because of this liability, FDIC had the right to defend claims against First Texas. In *Pernie Bailey*, 905 F.2d at 80, we held that "[a]fter assignment, NCNB [the new owner] became the proper party to sue on the notes, but even so, FDIC is entitled to defend a claim of rescission. Although the notes were assigned before removal, the FDIC remained the proper party to defend all claims for damages against the closed bank." Since it had a right to defend, it was a proper party. *Id.*

II. SUMMARY JUDGMENT

The conclusion that there is jurisdiction in the federal court leads us to consider the propriety of the district court's summary judgment in favor of First Gibraltar. We evaluate an award of summary judgment by reviewing the record under the same standards which guided the district court. *Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States Fire Ins. Co.*, 832 F.2d 1358, 1364 (5th Cir.), *clarified on other grounds*, 832 F.2d 1378 (5th Cir.1987). According to Rule 56(c), we cannot affirm a summary judgment unless "we are convinced, after an independent review of the record, that 'there is no genuine issue as to any material fact' and that the movant is 'entitled to a judgment as a matter of law.' " *Id.* In a further delineation of the application of the Rule, the Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986), said: "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." We consider fact questions with deference to the nonmovant. We decide questions of law de novo.

Griffin first argues that he has created a genuine issue of fact as to whether First Gibraltar can recover under the guaranty. It is clear from the summary judgment record, however, that First Gibraltar has that capacity. The guaranty provides that it "shall inure to the benefit of all transferees, credit participants, assignees, and/or endorsees of Holder." First Gibraltar submitted

an affidavit based on its records showing that it was the assignee of the guaranty and the promissory note. In addition, the acquisition agreement between FSLIC and First Gibraltar established the transfer of the guaranty and promissory note to First Gibraltar. Griffin offered no countering evidence to show that First Gibraltar cannot recover under the guaranty. Instead it advanced evidence undertaking to show only that First Gibraltar might not be a federal holder in due course. But proving holder in due course status is not important to whether First Gibraltar can sue under the guaranty. As an assignee and transferee of the guaranty and promissory note, First Gibraltar has the claim in any event.[3]

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[3] Whether First Gibraltar and the FDIC are federal holders in due course is an open question in this Circuit. The promissory note before us, acquired through a purchase and assumption agreement, has a variable interest rate; it is therefore non-negotiable. Tex.Bus. & Com.Code Ann. § 3.106 (1968). In *Sunbelt Savings, FSB Dallas, Texas v. Montross*, 923 F.2d 353, 356 (5th Cir.1991), a panel of this Circuit refused "to extend federal holder in due course status to the FDIC or its successor in cases in which it acquires non-negotiable instruments through purchase and assumption transactions." We recently agreed, however, to reconsider *Sunbelt* en banc, *Sunbelt Sav., FSB Dallas, Tex. v. Montross*, 932 F.2d 363 (5th Cir.1991). The question of federal holders in due course status in this situation is therefore unsettled at present.

Regardless of whether First Gibraltar is a holder in due course, it has a claim under the guaranty. It can make no difference that the outcome of this issue could, however, have an adverse affect on Griffin's affirmative defenses. If First Gibraltar and FDIC are federal holders in due course, Griffin could only assert real defenses, and not personal defenses

(Continued on following page)

A. *D'Oench Duhme*

One of Griffin's affirmative defenses, breach of agreement to fund, is based on an agreement not reflected in the loan documents. Only an *option* to provide financing appears in the bank's records. According to the *D'Oench Duhme* doctrine, Griffin therefore cannot assert the defense against First Gibraltar.[4]

D'Oench Duhme, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), protects the FDIC and its assignees from unrecorded side agreements not reflected in the bank's records, like the alleged agreement to fund. It allows the FDIC to rely on the official bank records, to the exclusion of any extraneous matters, to set forth the rights and obligations of the bank and those to whom it lends money. The *D'Oench Duhme* requirement is now embodied in part in federal statute. 12 U.S.C. § 1823(e). Because the agreement to fund is not set out in the bank's written loan documents, Griffin is precluded from asserting the claim under the doctrine of *D'Oench Duhme*. Griffin asserts two separate analyses to avoid this result.

(Continued from previous page)

against First Gibraltar and FDIC. All of Griffin's defenses are personal. The so-called real defenses are infancy incapacity, duress, illegality, fraud in factum, discharge in insolvency proceedings, or any discharge known to the holder in due course. Tex.Bus. & Com.Code Ann. § 3.305 (1968).

[4] In the wrongful foreclosure affirmative defense discussed in the next section, Griffin contends in part that First Texas agreed to bid at a specified price at the foreclosure sale and that First Texas breached this agreement. The agreement does not appear in the loan documents. It likewise fails according to *D'Oench Duhme*.

In his first analysis, he urges strenuously that *D'Oench Duhme* should not apply to the case against him. Griffin urges that the choice of law provisions of the contract between him and the bank preclude application of *D'Oench Duhme*. The loan documents do provide that Texas law will apply, and the choice of law provisions would be enforceable under Texas state law. Nevertheless, federal law still applies.

The choice of law provision in the guaranty addresses which state law applies when state law governs the case. Here, however, federal law provides the rule of decision. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Further, Griffin is essentially arguing that he can contract to have secret agreements enforceable against the FDIC and its assignees, if valid under Texas law. Private parties have no authority to override the *D'Oench Duhme* rule.

Griffin premises another argument on the contract choice of law provision. First Gibraltar engaged in allegedly inequitable conduct because it asserts *D'Oench Duhme* in this lawsuit, despite the contract choice of law provision. Griffin contends that First Gibraltar is thereby estopped from relying on *D'Oench Duhme*. There is no proof of inequitable conduct. Reliance on a well-established law cannot rise to the level of inequitable conduct. Further, as set out above, the contract only addresses which state law to apply when a state's law will provide the rule of decision. The assertion of controlling federal law overpowers this provision.

Griffin also makes the futile claim that asserting *D'Oench Duhme* in this situation impairs his constitutional

right to contract. Applying *D'Oench Duhme* here does not violate the constitutional prohibition against impairment of the right to contract. The Contract Clause focuses on *retroactive state legislation. Keystone Bituminous Coal Assoc. v. De Benedictis*, 480 U.S. 470, 503, 107 S.Ct. 1232, 1251, 94 L.Ed.2d 472 (1987). Here we have a doctrine created by federal courts before the contract was formed. The claim is frivolous.

Griffin argues further that we cannot apply *D'Oench Duhme* for the benefit of First Gibraltar, a transferee of FSLIC. Specifically, he contends that Congress enacted a comprehensive scheme for regulating the banking and thrift system which preempts *D'Oench Duhme*. In 12 U.S.C. § 1823(e) Congress codified *D'Oench Duhme*. Griffin argues that the law is for the benefit only of the FDIC. It follows, Griffin urges that the courts can only apply *D'Oench Duhme* and § 1823(e) to the FDIC and other entities included by Congress, not to assignees or transferees of FDIC or FSLIC. The contention fails.

First, § 1823(e) does not preempt *D'Oench Duhme*. Nor does it affect the vitality of the rule established in *D'Oench Duhme*. Rather, Congress intended that it serve as an adjunct to the federal statutory policy embodied in *D'Oench Duhme. Bell & Murphy and Assoc., Inc. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 753 (5th Cir.), *cert. denied*, __ U.S. ___, 111 S.Ct. 244, 112 L.Ed.2d 203 (1990); *Federal Deposit Ins. Corp. v. McClanahan*, 795 F.2d 512, 516 (5th Cir.1986). Congress did not take away the power of the courts to apply *D'Oench Duhme* to entities not covered by § 1823(e). Second, this Court has established controlling precedent since the statutory enactment. We have specifically held that *D'Oench Duhme* can be applied for

the benefit of an assignee or a transferee/purchaser from FDIC or FSLIC. *Porras v. Petroplex Sav. Ass'n*, 903 F.2d 379, 381 (5th Cir.1990); *Bell & Murphy*, 894 F.2d at 754.

Griffin also tries to avoid application of *D'Oench Duhme* by arguing that First Gibraltar failed to prove that *D'Oench Duhme* applies to Griffin's defenses for two reasons. One, First Gibraltar allegedly failed to prove that the four affirmative defenses are based on secret agreements. Two, First Gibraltar allegedly failed to prove that Griffin lent himself to a "scheme" to mislead the banking authorities.

The requirements of *D'Oench Duhme* are met. The agreements alleged here are unenforceable because they are not reflected in the bank's records. *Campbell Leasing, Inc. v. Federal Deposit Ins. Corp.*, 901 F.2d 1244, 1248 (5th Cir.1990). They need not be "secret," only outside the bank's records. In addition, an actual scheme is not required as Griffin alleges. All that is relevant is that the agreements are not in the files. Such unfiled agreements leave the regulators without warning that they exist. "Even borrowers who are innocent of any intent to mislead banking authorities are covered by the doctrine if they lend themselves to an arrangement which is likely to do so." *Id.* The alleged side oral agreements (i.e., agreement to form a partnership, agreement to fund subsequent loans, and the agreement to bid in the property at a specified price) all have the effect of misleading regulatory authorities.

Griffin sets out another line of argument to preclude our application of *D'Oench Duhme* by contending that the

application of *D'Oench Duhme* improperly impairs a variety of his rights. First Griffin alleges that the court's barring of his claims deprived him of his right to offset any amount he owes to First Gibraltar with what First Gibraltar, as successor to First Texas, owes him. Griffin also contends that he has an equitable lien on the assets of First Gibraltar, a lien improperly defeated by *D'Oench Duhme*. Both of these contentions are denied on their face by the Supreme Court's holding in *D'Oench Duhme*.

Next, Griffin contends that the application of *D'Oench Duhme* to bar his claims is an unconstitutional taking. In essence he argues that the effect of the government's action in applying *D'Oench Duhme* is a taking of his defenses and right to offset. In addition, depriving him of a trial is a taking of his property without compensation. The argument fails. This is not a taking that deserves compensation because the taking is a consequence of his own failure to have his agreements written and part of the bank records. *See Campbell Leasing, Inc. v. Federal Deposit Ins. Corp.*, 901 F.2d 1244, 1248 (5th Cir.1990).

Griffin also contends that application of *D'Oench Duhme* violated his constitutional right to procedural due process. Due process is satisfied because he had the opportunity to familiarize himself with the general requirements of *D'Oench Duhme* and to comply with them.

B. *State Law*

Griffin asserts three other affirmative defenses – breach of partnership duties, usury, and wrongful foreclosure – to defeat his liability under the guaranty. We find that these three defenses are not viable under Texas law. We therefore need not decide whether *D'Oench Duhme* would bar them. *See Federal Deposit Ins. Corp. v. Lattimore Land Corp.*, 656 F.2d 139, 146 (5th Cir. Unit B Sept. 1981).

1. Partnership

Griffin asserts that the loan documents establish that First Texas formed a partnership with him, Williams, and the joint venture. Griffin points to several sections of the loans documents as proof of partnership. His reading of the loan documents is highly imaginative. For example, as proof that the bank agreed to share 75% of the joint venture's losses, he cites the provision in the guaranty which limits the liability of the guarantors to 25% of the principal plus interest. Limiting the liability of the guarantors does not entail an agreement to share in the business losses of the joint venture.

Griffin does, however, read correctly the Assignment of Net Profits Interest, but he cites it incorrectly as proof of the existence of a partnership. In the assignment, the joint venture agreed to give 40% of its profits to the bank. As a matter of Texas law, this cannot be evidence of a partnership. Section 7(4) of the Texas Uniform Partnership Act provides:

> (4) The receipt by a person of a share of the profits of a business is prima facie evidence that

> he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:
>
> * * *
>
> (d) As interest on a loan, though the amount of payment vary with the profits of the business.

Tex. Rev. Civ. Stat. Ann. art. 6132b § 7(4)(d) (Vernon 1970). Therefore, the one piece of evidence that Griffin correctly interprets cannot be proof of partnership as a matter of law. In addition, there was no agreement to share losses. "While not conclusive, the absence of an express provision obligating the parties to share in any losses is indicative that a partnership was not intended." *Gutierrez v. Yancey*, 650 S.W.2d 169, 172 (Tex. App. – San Antonio 1983, no writ).

The bank, the joint venture, Williams, and Worth [sic] stated in the loan documents that they formed no partnership. The parties' intent is the most important test in determining whether a partnership is formed. Thus in *Holman v. Dow*, 467 S.W.2d 547, 550 (Tex. Civ. App. – Beaumont 1971, writ ref. n.r.e.) the court found that no partnership was formed when parties agreed to share 40% of net profits and stipulated that it was not their intent to create a partnership. Of course, a statement that no partnership is formed cannot be conclusive proof that no partnership was formed. In *Howard Gault and Son, Inc. v. First Nat'l Bank*, 541 S.W.2d 235, 237 (Tex. Civ. App. – Amarillo 1976, no writ) the court held that a partnership was formed despite written agreement stating that the parties were not partners but landlord and tenant. Nevertheless, intent is clearly the major focus when deciding whether a partnership exists. *Voudouris v. Walter E. Heller*

& Co., 560 S.W.2d 202, 206 (Tex. Civ. App. – Houston [1st Dist.] 1977, no writ). Because the written documents reflect an intention not to form a partnership, because the parties agreed not to share profits, and because the assignment of profits is not evidence of an intent to form a partnership, we hold that it is clear that no partnership was formed.

2. Usury

Griffin also uses the assignment of net profits as proof of another affirmative defense, usury. He claims that First Texas charged usurious interest because in consideration of First Texas' making the 5.6 million dollar loan, the joint venture agreed to assign 40% of its net profits to First Texas. Griffin claims that this provision was usurious and that therefore First Gibraltar cannot recover against him as guarantor.

We can assume that the assignment of 40% of net profits to First Texas constituted usurious interest on the obligation.[5] But it makes no difference. Under Texas law a

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[5] Texas law is unclear on whether this is a usurious obligation. Some courts have held that an obligation is not usurious if it is based on a contingency. *See, e.g., Beavers v. Taylor*, 434 S.W.2d 230 (Tex. Civ. App. – Waco 1968, writ ref'd n.r.e.) (assignment of a percentage of gross sales is not usurious because a "loan is not usurious where the promise to pay a sum depends upon a contingency."). Other Texas courts have taken a different approach, holding that "[a] contract is usurious if there is any mode or contingency by which the lender could receive more than the maximum rate of interest allowed by law." *Dixon v. Brooks*, 678 S.W.2d 728, 729 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.).

guarantor cannot assert any claim of usury in the underlying obligation. Usury is a personal defense and may not be asserted by a guarantor unless the contract with the guarantor also contains the usurious provision. *See Houston Sash and Door Co. v. Heaner*, 577 S.W.2d 217, 222 (Tex. 1979); *Universal Metals and Mach., Inc. v. Bohart*, 539 S.W.2d 874, 879 (Tex. 1976); *Nautical Landings Marina, Inc. v. First Nat'l Bank*, 791 S.W.2d 293, 298 (Tex. App. – Corpus Christi 1990, writ denied); 13 Tex. Jur. 3d, Consumer and Borrower Protection Laws § 71 at 121-22 (1981). The contract with the guarantor did not contain the asserted usurious provision, the 40% assignment of profits.

A guaranty, however, may not be enforced if the underlying obligation is void for illegality. *Heaner*, 577 S.W.2d at 222; *Moore v. White Motor Credit Corp.*, 708 S.W.2d 465, 472 (Tex. App. – Dallas 1985, writ ref'd n.r.e.), *overruled on other grounds, Carpet Servs., Inc. v. George A. Fuller Co.*, 802 S.W.2d 343, 345-46 (Tex. App. – Dallas 1990, writ granted).[6] Texas provides by statute that if the interest charged by a lender exceeds twice the maximum rate allowed by law, then, among other penalties, the lender cannot collect the principal balance remaining from the borrower. Tex. Rev. Civ. Stat. Ann. art. 5069-1.06(2)

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[6] In *Moore*, the Dallas Court of Appeals held that a demand for interest at a usurious rate in a pleading was a "charging" of usurious interest forbidden by statute. The Dallas Court of Appeals overruled this holding in *Carpet Services*, a case which the Texas Supreme Court has agreed to consider.

(Vernon 1987). It is unclear under Texas law whether an obligation to pay twice the interest allowed by law is, in any or all circumstances, void for illegality. 13 Tex. Jur.3d, Consumer and Borrower Protection Laws § 46 at 93-94 (1981). *Compare Heaner,* 577 S.W.2d at 222 (guarantor cannot assert defense of usury in underlying obligation because the usurious obligation is not void) *with Allee v. Benser,* 779 S.W.2d 61, 63 (Tex. 1988) (portion of agreement imposing usurious interest "void") (quotations in original) *and Tri-County Farmer's Co-op v. Bendele,* 641 S.W.2d 208, 209 n.2 (Tex. 1982) (per curiam) "A usurious contract is, of course, void as a matter of law.").

Heaner is a situation similar to the case before us. In it, the Texas Supreme Court held that the usurious obligation is not void for illegality. In that case, the plaintiff had charged and contracted for a usurious rate of interest in excess of twice that allowed by law. 577 S.W.2d at 221. The underlying note was held, however, not to be void for illegality. Therefore, the guarantor could not assert a usury defense based on the interest charged in the underlying obligation to which he was not a party. *Id.* at 222.

A Texas Court of Appeals court reached a similar result in *Moore,* 708 S.W.2d at 472. The lender in that case sued upon installment contracts. In its pleadings, it asserted a right to twice the interest rate allowed by law because of its interpretation of acceleration clauses. The court noted that a guarantor cannot assert the defense of usury unless the underlying obligation is void for illegality. It then concluded that the guarantor could not assert the usury defense and would be liable under the

guaranty.[7] *See also Allee*, 779 S.W.2d at 63-64 (junior lienholder could not assert defense of usury although interest charged was allegedly twice that allowed).

We hold, therefore, that under Texas law, Griffin cannot assert the defense of usury in the promissory note to which he was not a party. This promissory note, possibly charging twice the interest allowed by law,[8] is not, in other words, considered to be void for illegality according to Texas law. When the Texas Supreme Court has used the term "void" in connection with usury, they seem to imply only that the usurious interest is void. The Texas courts have not held that underlying obligation itself is void for illegality. *Allee*, 779 S.W.2d at 63; *Bendele*, 641 S.W.2d at 209 n. 2. Instead, the Texas Supreme Court has enforced contracts charging twice the interest allowed by law against a junior lienholder and a guarantor. *Allee*, 779 S.W.2d at 63-64 (junior lienholder); *Heaner*, 577 S.W.2d at 222 (guarantor). The guarantor in *Heaner* and the junior

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[7] It is not entirely clear, however, that the court in *Moore* would reach a similar result in this case. The court placed importance on the fact that in the lender's pleadings, which asserted the usurious obligation, the lender had not sued the guarantor and that in the pleadings in which the lender did sue the guarantor, the lender was no longer requesting usurious interest. 708 S.W.2d at 472 n. 6. Moreover, the installment contracts themselves were not usurious on their face.

[8] It is not clear from the record that a charging of 40% of the net profits would be a charge of twice the legal rate. The record does not indicate what the joint venture's profits were, if any.

lienholder in *Allee* were not allowed to assert the statutory penalties, including the forfeiture of the principal balance under Tex. Rev. Civ. Stat. Ann. art. 5069-1.06(2).

We do not hold, as the district court did, that the savings clauses in the loan agreement prevent a finding of usury in the promissory note. "[T]he mere presence of a usury savings clause will not rescue a transaction that is necessarily usurious by its explicit terms." *Mack v. Newton*, 737 F.2d 1343, 1371 (5th Cir. 1984) (applying Texas law). Certain savings clauses will, however, prevent a transaction from being usurious by its terms.

In re Casbeer, 793 F.2d 1436, 1446-47 & nn. 28-30 (5th Cir. 1986), applied Texas law as to savings clauses to prevent usury. In *Casbeer*, the borrower assigned 100% of its net sales proceeds from certain properties to the lender, an assignment which ultimately made the loan usurious. The savings clauses throughout the loan documents strictly limited the lender to receive only the maximum interest permitted by law. Any interest received exceeding the rate permitted by law was to be deemed a mistake and returned to the debtor. We remanded the case to allow a return of that portion of the assignment which violated Texas usury laws.

The loan documents here do not have the necessary savings clauses to prevent the assignment of net profits from being usurious on its face in the event that this is a usurious agreement.[9] Although the promissory note and

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[9] *See* n. 8, *supra*.

guaranty have strict savings clauses similar to the ones in *Casbeer,* no savings clause appears in the separate document assigning net profits, as did the assignment in *Casbeer.* The documents therefore do not reflect an intent to return usurious amounts received under the assignment of net profits, as the parties intended to do in regard to net sales proceeds in *Casbeer.* Thus, the savings clauses themselves do not preclude a finding of usury, and we decide the usury issue without regard to savings clauses.

3. Wrongful Foreclosure

Griffin's third affirmative defense is wrongful foreclosure. Griffin asserts that First Texas, as a partner, had a duty to get the highest price at the foreclosure sale, a duty it allegedly breached. Since no partnership can be asserted against First Texas, Griffin cannot rely on such duty. Griffin also contends that First Texas did not give the required notice of acceleration. According to the loan documents, First Texas had to give Griffin, Williams, and the joint venture five days notice of acceleration. On October 9, 1986, First Texas gave notice of intent to accelerate on October 14, 1986 at noon. It gave notice of acceleration October 14th. Only if the 9th and 14th are both not counted is the notice irregular. There is no reason not to count either of the two dates, even though the acceleration officially occurred at noon on October 14th.

III. SUMMARY JUDGMENT EVIDENCE

Griffin's last argument on appeal is that the district court should have struck some of First Gibraltar's summary judgment evidence because (1) First Gibraltar's

affiants were not identified as witnesses in its answers to interrogatories, (2) the affidavit of First Gibraltar's vice-president, Timothy O'Connor, was not based on personal knowledge, and (3) O'Connor's affidavit contained hearsay.

The district court properly considered the evidence. First Gibraltar had no duty to answer any interrogatories because none were served on it. The interrogatories addressed to First Texas did not apply to First Gibraltar. First Gibraltar was an intervener, did not substitute for First Texas, and did not adopt the interrogatories directed to First Texas. The O'Connor affidavit was a business record affidavit. It demonstrates O'Connor's personal knowledge to testify as a custodian of documents. Moreover, as senior attorney for First Texas, he had personal knowledge as to some of the statements in the affidavit. All hearsay statements come within the business record exception, and were entirely supported by business records attached to the affidavit.

CONCLUSION

A thorough consideration of the entire record leads to the conclusion that the district court was correct in granting summary judgment in favor of First Gibraltar as to its claims against guarantor Griffin.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-1301

D.C. Docket No. CA 3 89 0272 H

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ETC.,

Plaintiff,

and

FIRST GIBRALTAR BANK, FSB,

Intervenor-Appellee,

versus

JACK GRIFFIN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

Before JOHNSON, WILLIAMS and HIGGINBOHTAM [sic], Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to intervenor-appellee the cost on appeal to be taxed by the Clerk of this Court.

July 15, 1991

ISSUED AS MANDATE: AUG 29 1991

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR FIRST TEXAS SAVINGS ASSOCIATION	*	
Plaintiff	*	Civil Action No. 3-89-0272-H (Entered: January 7, 1990)
FIRST GIBRALTAR BANK FSB	*	
Intervenor	*	
v.	*	
JACK GRIFFIN	*	
Defendant	*	

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant Griffin's Motion for Remand, filed August 30, 1989. The Motion to Remand is DENIED. *See Triland Holdings & Co. v. Sunbelt Svc. Corp.*, 884 F.2d 205 (5th Cir. 1989).

Griffin has also made a Motion to Strike, filed October 19, 1989. The Court has received First Gibraltar's response, filed October 27, 1989. Griffin's Motion to Strike is DENIED, and counsel are directed to reread *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988).

Remaining before the Court is Intervenor First Gibraltar's Motion for Summary Judgment, filed September 6, 1989, Defendant Griffin's response, filed October 19, 1989, and Intervenor's reply, filed October 30, 1989.

This is a suit for payment on a guaranty of a promissory note. Defendant Griffin guaranteed a promissory note made to First Texas Savings Association. When First Texas was taken over by FSLIC, the guaranty passed to FSLIC. FSLIC subsequently transferred the guaranty to Intervenor First Gibraltar who now sues for the amount outstanding on the note.

The record demonstrates, and Griffin does not contend otherwise, that he executed the guaranty. However, he asserts a number of affirmative defenses/counterclaims to defeat his liability under the guaranty. Intervenor asserts that those defenses/counterclaims are barred by the doctrine established by *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and its progeny. The doctrine is a rule of estoppel which has been interpreted as an irrefutable presumption in favor of the FDIC (or FSLIC) that the documents of the bank as of the date of the bank's insolvency represent the true agreement of the parties. *RSR Properties, Inc. v. FDIC*, F. Supp. 524, 531 (W.D. Tex. 1989).

The critical threshold issue that must be addressed is whether the *D'Oench Duhme* doctrine protects a third-party who receives a note through FSLIC from an insolvent bank. This Court, in accordance with numerous other courts and the policy behind *D'Oench*, holds that the doctrine applies to third parties who have acquired assets from either FSLIC or FDIC. *See, e.g., San Angelo Sav.*

Ass'n v. Reese, No. CA6-87-0058W (N.D. Tex. Feb. 17, 1989) (recipient of note and guaranty from failed institution through FSLIC entitled to assert *D'Oench Duhme* against maker of note and guaranty); *RSR Properties, supra*, 706 F. Supp. at 531 (recipient of note from failed institution through FDIC may assert *D'Oench* against maker of note).

Defendant Griffin raises four affirmative defenses and counterclaims which he asserts survive the application of *D'Oench Duhme*. They are: breach of partnership duties; usury; breach of agreement to fund; and wrongful foreclosure. All of these defenses/counterclaims fail.

Breach of Partnership Duties

Griffin asserts that a partnership among himself, First Texas, and others was established by the loan documents, and that First Texas breached its partnership duties. The Court finds that the documents upon which Griffin relies to establish a partnership do not provide notice to FSLIC or First Gibraltar of an alleged partnership. In fact, the Assignment of Net Profits Interest relied upon by Griffin states that "[First Texas], by its acceptance hereof, does not become a member, agent, venturer or partner . . . ." Thus, while it is doubtful whether as a matter of Texas law Griffin could prove that a partnership had been created, it is not necessary to reach that issue. Application of the *D'Oench Duhme* doctrine precludes this defense because the partnership was not apparent from the face of the documents.

Usury

Griffin asserts that the "Commitment Fee" and the assignment of 40% of the profits from the joint venture to First Texas must be added to the interest charged by First Texas on the loan; if this is done, the rate charged was higher than the maximum allowed by Texas law.

Usury is a personal defense under Texas law, and as such generally may not be asserted by a guarantor. *Houston Sash and Door Co., Inc. v. Heaner,* 577 S.W.2d 217, 222 (Tex. 1979). However, a guaranty may not be enforced if the underlying obligation is void. *Id.* Section 5069-8.02 of the Tex. Rev. Civ. Stat. provides that if the interest charged by a lender exceeds twice the maximum rate allowed by law, then among other penalties, the principal balance remaining must be forfeited. But Griffin waived this defense in the guaranty by agreeing that "no provision or term of the Obligations shall ever be construed to create a contract by Guarantors to pay . . . interest at a rate in excess of the maximum interest rate permitted . . . . " Accordingly, the defense of usury fails.

Breach of Agreement to Fund

Griffin's third contention is that First Texas breached its agreement to extend construction financing to the project. However, Griffin admits that the agreement was oral only. Accordingly, the defense is barred under *D'Oench Duhme.*

Wrongful Foreclosure of Property

Griffin's fourth defense is that First Texas failed to give proper notice of its intention to accelerate the loan, and failed to bid the appraised value upon the foreclosure and sale of the mortgaged property.

An action for wrongful foreclosure under Texas law requires proof of (1) an irregularity in the sale that caused the property to be bid in at (2) a grossly inadequate price. *Diversified Developers, Inc. v. Texas First Mortgage Reit*, 592 S.W.2d 43, 45-46 (Tex. Civ. App. – Beaumont 1979, writ ref. n.r.e.). All that Griffin alleges is that pursuant to First Texas' partnership duties, it had to bid or credit the appraised value of the land at foreclosure. The Court has already determined that no partnership existed. Therefore, First Texas had no obligation to bid the appraised value.

Assuming, however, that Griffin has raised a factual issue as to adequacy of the bid, Griffin still has failed to allege an irregularity in the sale. No wrongful foreclosure may be found on this ground.

Griffin further alleges that insufficient notice of acceleration was given by First Texas. The Deed of Trust required five days notice; the notice of intent to accelerate was dated October 9, 1986; the notice of acceleration was dated October 14, 1986.

On their face, these notices appear to comply with the five-day requirement.[1] Even if the notices do not meet

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[1] If the 9th is not counted, on the grounds that the delivery of the notice might be so late as to preclude effective use of the

(Continued on following page)

the requirement, Griffin admits receipt of the notices, but fails to allege that he was in a position to cure or that the defect caused an inadequate price to be bid at the sale. Such a minor defect does not support a wrongful foreclosure claim. *See Jasper Fed. Sav. & Loan Ass'n v. Reddell*, 730 S.W.2d 672 (Tex. 1987) (failure to provide notice of right to reinstate did not support wrongful foreclosure claim where mortgagor had actual knowledge of right).

All of Griffin's defenses/counterclaims being meritless, the Motion for Summary Judgment is GRANTED. First Gibraltar shall submit a proposed judgment by noon, January 29, 1990.

SO ORDERED.

DATED: January 17, 1990.

/s/ Barefoot Sanders
BAREFOOT SANDERS, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

(Continued from previous page)

day by the recipient, then the 14th may not be counted either on the same grounds. If, however, the 9th is counted and the 14th not counted, still five days passed. The only manner in which five days did not pass between the 9th and the 14th is if neither are counted. In other words, only the 10th, 11th, 12th, and 13th count as days, totally only four. But there is no logical support for counting neither.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR FIRST TEXAS SAVINGS ASSOCIATION	§	CIVIL ACTION NO. CA-3-89-0272-H
Plaintiff	§	(Entered: February 7, 1990)
FIRST GIBRALTAR BANK, FSB	§	
Intervenor	§	
v.	§	
JACK GRIFFIN	§	
Defendant	§	

FINAL SUMMARY JUDGMENT

Pursuant to the Memorandum Opinion and Order entered in this case on January 17, 1990, the Court hereby enters final summary judgment for Intervenor First Gibraltar Bank, FSB as follows:

IT IS, HEREBY, ORDERED, ADJUDGED AND DECREED that Intervenor First Gibraltar Bank, FSB recover of and from Jack Griffin the sum of $1,442,500.00, together with prejudgment interest in the sum of $684,673.76 for a total of $2,127,173.76.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff First Gibraltar Bank, FSB recover

of and from Jack Griffin the sum of $9,900.00 in attorneys' fees; and should this case be appealed to the Fifth Circuit Court of Appeals, the additional sum of $5,000.00; and should further relief be sought at the United States Supreme Court, the additional sum of $5,000; as well as all costs of court expended herein by Plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all attorneys' fees and any and all pre-judgment interest are part of the judgment hereby rendered.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that post-judgment interest shall accrue on the total amount of this judgment at the rate of 7.74 percent per annum, compounded annually, from this date forward until paid.

All costs of court expended or incurred in this action are hereby adjudged against defendant Jack Griffin.

All writs and processes for the enforcement and collection of this final judgment or the costs of court may issue as necessary.

Signed this 7 day of Feb, 1990.

Barefoot Sanders
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR FIRST TEXAS SAVINGS ASSOCIATION	*	
Plaintiff	*	Civil Action No. 3-89-0272-H (Entered: April 4, 1990)
FIRST GIBRALTAR BANK FSB	*	
Intervenor	*	
v.	*	
JACK GRIFFIN	*	
Defendant	*	

ORDER

Before the Court is Defendant Griffin's Motion for New Trial, filed February 20, 1990 and Intervenor's response, filed March 9, 1990.

The Court cannot discern any reason to reopen this case, summary judgment having been granted earlier. Accordingly, Defendant Griffin's motion is **DENIED.**

SO ORDERED.

DATED: April 4, 1990.

/s/ Barefoot Sanders
BAREFOOT SANDERS, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 90-1301

THE FEDERAL SAVINGS AND LOAN INSURANCE CORP., Etc.,

Plaintiff,

and

FIRST GIBRALTAR BANK, FSB,

Intervenor-Appellee,

versus

JACK GRIFFIN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

---

ON PETITION FOR REHEARING

(Entered: August 19, 1991)

Before JOHNSON, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ J S Williams
United States Circuit Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR FIRST TEXAS SAVINGS ASSOCIATION,	§	
Plaintiff and Counter-Defendant,	§	CIVIL ACTION NO. CA-89-0272-H
VS.	§	
JACK GRIFFIN,	§	
Defendant and Counter-Plaintiff.	§	

VERIFIED PETITION FOR REMOVAL

Petitioner, the Federal Savings and Loan Insurance Corporation ("FSLIC"), in its capacity as Receiver for First Texas Savings Association (the "Association"), the Plaintiff and Counter-Defendant in the above-referenced case, hereby petitions this Court, pursuant to 12 U.S.C. § 1730(k)(1) and 28 U.S.C. § 1441, for removal of the following described action (the "State Court Action"):

> FIRST TEXAS SAVINGS ASSOCIATION vs. WORTH WILLIAMS and JACK GRIFFIN, Jointly and Severally, pending as cause number 87-3519-F in the 116th Judicial District Court of Dallas County, Texas

1. FSLIC is a corporation created by the United States Congress pursuant to 12 U.S.C. § 1725(a) and authorized to sue pursuant to 12 U.S.C. § 1725(c). FSLIC is an agency of the United States directed by the Federal Home Loan Bank Board (the "Bank Board") and has its principal office in the District of Columbia (12 U.S.C. § 1725(a)). Pursuant to 12 U.S.C. §§ 1724, 1726, 1729(f) and 1730(m), FSLIC has been charged by Congress with the responsibility of maintaining the financial stability of the savings and loan industry throughout the United States and of protecting the depositors in and creditors of such institutions through the creation, maintenance and protection of the FSLIC depository insurance fund.

2. On December 27, 1988, pursuant to 12 U.S.C §§ 1464(d)(6)(A) and 1729(c)(1)(B), the Bank Board appointed FSLIC as Receiver for the Association. The appointment was effected by a duly authorized resolution of the Bank Board, Resolution No. 88-1404P. A true and correct copy of the resolution is attached as Exhibit A and incorporated in this Petition by reference.

3. Pursuant to federal law, FSLIC, as Receiver for the Association, has the exclusive authority to exercise all rights and powers of the association and to " . . . institute, prosecute, maintain, defend, intervene, and otherwise participate in any legal proceedings by and against the receiver or association . . . " 12 C.F.R. § 549.3(a) (incorporating 12 C.F.R. §§ 548.2(b) and (f) (1988)); 12 U.S.C. § 1729(c)(1)(B).

4. Pursuant to 12 U.S.C. 1730(k)(1), the State Court Action is deemed to have arisen under the laws of the United States, regardless of the amount in controversy.

5. This Court has removal jurisdiction over this action pursuant to 28 U.S.C. § 1441(a), and this petition is timely filed.

6. The Association filed suit against Mr. Griffin and Worth Williams on their written Guaranty of of [sic] the promissory note of the Village at Spring Park Joint Venture. Mr. Williams has filed for protection under the Bankruptcy Code and has been non-suited. By his defenses and counterclaims, Mr. Griffin has alledged [sic] that the transaction was usurious, that the association breached an oral agreement to make a construction loan, that proper notice of foreclosure was not given and that misrepresentations were made in regard to what the foreclosure bid would be.

7. On January 18, 1989, a Standing Order for the United States District Court for the Northern District of Texas was entered in Civil Action No. CA3-89-0124-H, *First Texas Savings Association v. Panterra Enterprises, Inc., et al.*, limiting the pleadings that must be filed with Petitions for Removals filed by the FSLIC as Receiver for this Association. Pursuant to the terms of said Standing Order, Petitioner has attached to this Petition for Removal a copy of the Standing Order as Exhibit B-1, a list of all attorneys involved in this action including addresses, telephone numbers and the parties they represent as Exhibit B-2 and a copy of the following pleadings and papers filed in the trial court and the appellate court: Plaintiff's Original Petition and Application for Injunctive Relief, Amended Original Counterclaim and Third Party Action, Summary Judgment, Brief of Appellants and Brief of Appellees as Exhibit B-3.

8. Pursuant to 12 U.S.C. § 1730(k)(1), FSLIC is an agency of the United States and is not required to post a bond or any other security in connection with this petition (28 U.S.C. § 1446(d)). Federal law does not require the joinder of any other defendant in FSLIC's petition for removal.

9. Promptly after the filing of this Petition for Removal, Petitioner will give notice of this Petition to all adverse Parties and shall file a copy of the Petition with the Clerk of the State Court from which the action is being removed. A true and correct copy of said Notice of Removal is attached hereto as Exhibit C.

WHEREFORE, Petitioner, the Federal Savings and Loan Insurance Corporation as Receiver for First Texas Savings Association, prays that this action be removed from the 116th Judicial District Court of Dallas County, Texas to this Court.

Dated: January 25, 1989.

Respectfully submitted,

FOUTS & MOORE

By: Michael B. Lee
Michael B. Lee

1800 Bering, Suite 500
Houston, Texas 77057-3190
(713) 266-3883

ATTORNEYS FOR THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR FIRST TEXAS SAVINGS ASSOCIATION

OF COUNSEL:

Jordan Luke
General Counsel

Dorothy L. Nichols
Senior Associate General Counsel

Michael D. Solomon
Senior Trial Attorney

OFFICE OF THE GENERAL COUNSEL
FEDERAL HOME LOAN BANK BOARD
1700 G Street, N.W.
Washington, D.C. 20552
(202) 377-6432

VERIFICATION

Pursuant to 28 U.S.C. § 1746, Michael B. Lee declares under penalty of perjury that he is one of Petitioner's attorneys, that he has read the foregoing Petition for Removal and that he knows the contents thereof to be true and correct based on his own knowledge and belief and on information supplied to him by persons upon whom he relies.

Executed on January 25, 1989.

/s/ Michael B. Lee
Michael B. Lee

CERTIFICATE OF SERVICE

I certify that, pursuant to Rule 5 of the Federal Rules of Civil Procedure, a true and correct copy of the foregoing Verified Petition for Removal was served upon all

counsel of record by delivery or mailing of a copy on January 25, 1989.

/s/ Michael B. Lee
Michael B. Lee

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, as Receiver for FIRST TEXAS SAVINGS ASSOCIATION	§	CASE NO. CA3-89-0272-H
Plaintiff,	§	(Entered: May 15, 1989)
v.	§	
JACK GRIFFIN	§	
Defendant.	§	

ORDER DENYING DEFENDANT'S
MOTION FOR REMAND

On this the 15 day of May, 1989, came on to be considered the Defendant's Motion For Remand, and this Court having considered the same, the Response of the Federal Savings and Loan Insurance Corporation, and the other pleadings filed herein, is of the opinion that Defendant's Motion For Remand should be denied. It is, therefore:

ORDERED that Defendant's Motion for Remand is denied.

SIGNED this the 15 day of May, 1989.

/s/ Barefoot Sanders
PRESIDING JUDGE

APPROVED AS TO FORM AND
ENTRY REQUESTED:

Original signed by:
Michael B. Lee
MICHAEL B. LEE
ATTORNEY IN CHARGE
Admission Pending Pro Hac Vice
State Bar No. 12129500
WANDA L. MCKEE
Admission Pending Pro Hac Vice
State Bar No. 13698700
5555 San Felipe, 17th Floor
Houston, Texas 77056
(713) 622-9966

ATTORNEYS FOR FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, as Receiver for FIRST TEXAS SAVINGS ASSOCIATION

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, as Receiver for FIRST TEXAS SAVINGS ASSOCIATION	*	Civil Action No. 3-89-0272-H
Plaintiff,	*	(Entered: July 3, 1989)
v.	*	
JACK GRIFFIN	*	—
Defendant.	*	

ORDER

Before the Court are First Gibraltar Bank, FSB's ("Gibraltar") Plea in Intervention and Supporting Brief, filed May 23, 1989; Defendant's Response thereto, filed June 13, 1989; Gibraltar's First Amended Plea in Intervention, filed June 23, 1989; and Gibraltar's Reply, filed June 26, 1989.

After careful consideration of the materials presented, the Court hereby **GRANTS** Gibraltar's Plea in Intervention pursuant to Fed.R.Civ.P. 24. Accordingly, the Court **ORDERS** that Gibraltar has leave to intervene in this case, adopting the Original Petition filed by First Texas Savings Association as if it were Gibraltar's own.

SO ORDERED.

DATED: July 3, 1989.

/s/ Barefoot Sanders
BAREFOOT SANDERS
UNITED STATES
DISTRICT JUDGE

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE FEDERAL DEPOSIT INSURANCE CORPORATION, as Manager of the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION RESOLUTION FUND, as Receiver for FIRST TEXAS SAVINGS ASSOCIATION,	§	CIVIL ACTION NO. CA-89-0272-H (Entered: November 21, 1989)
Plaintiff,	§	
v.	§	
JACK GRIFFIN,	§	
Defendant.	§	

DISMISSAL WITHOUT PREJUDICE

On this day came on the Counter-Plaintiff, Jack Griffin ("Griffin") and the Counter-Defendant, The Federal Deposit Insurance Corporation, as Manager of the Federal Savings and Loan Insurance Corporation Resolution Fund, as Receiver for First Texas Savings Association ("FDIC"), heretofore denominated the Plaintiff in this action, and jointly stipulate to the Court that they agree to dismiss the Counterclaim of Griffin against the FDIC pursuant to Rule 41, Fed.R.Civ.Pro., without prejudice. The Court finds that this matter is well taken. IT IS, THEREFORE,

ORDERED that the Counterclaim of Griffin against the FDIC is dismissed without prejudice. All costs of Court regarding the Counterclaim shall be taxed against Griffin.

SIGNED this 20 day of Nov., 1989.

/s/ Barefoot Sanders
UNITED STATES
DISTRICT JUDGE

AGREED AS TO FORM AND CONTENT:

FOUTS & MOORE

By: /s/ Michael B. Lee
Michael B. Lee
5555 San Felipe, 17th Floor
Houston, Texas 77057
(713) 622-9966

ATTORNEY FOR COUNTER-DEFENDANT FDIC

HUNTER, VAN AMBURGH & WOLF,
A Professional Corporation

By: /s/ Douglas P. Ray
Douglas P. Ray
5949 Sherry Lane, Suite 1395
Dallas, Texas 75225
(214) 750-1395

ATTORNEY FOR COUNTER-PLAINTIFF GRIFFIN

APPENDIX K

TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 1 of the United States Constitution provides:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

12 U.S.C. § 1819(b) As Amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 provides:

(1) Status

The Corporation, in any capacity, shall be an agency of the United States for purposes of section 1345 of Title 28, without regard to whether the Corporation commenced the action.

(2) Federal court jurisdiction

(A) In general

Except as provided in subparagraph (D), all suits of a civil nature at common law or in equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.

(B) Removal

Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any action, suit, or proceeding from a State court to the appropriate United States district court.

(C) Appeal of remand

The Corporation may appeal any order of remand entered by any United States district court.

(D) State actions

Except as provided in subparagraph (E), any action –

(i) to which the Corporation, in the Corporation's capacity as receiver of a State insured

depository institution by the exclusive appointment by State authorities, is a party other than as a plaintiff;

(ii) which involves only the preclosing rights against the State insured depository institution, or obligations owing to, depositors, creditors, or stockholders by the State insured depository institution; and

(iii) in which only the interpretation of the law of such State is necessary,

shall not be deemed to arise under the laws of the United States.

---

12 U.S.C. § 1823(e) As Amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 provides:

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement –

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

---

28 U.S.C. § 1441 provides:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be

removed and the district court may determine all issues therein, or, in its discretion, may may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

---

12 U.S.C. § 1730(k)(1) of the National Housing Act (repealed by § 407 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989) provides:

Notwithstanding any other provision of law, (A) the Corporation shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in

controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court of the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided*, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any action, suit, or proceeding in any court of any State or of the United States or any territory or any other court.

---

28 U.S.C. § 1652 Rule of Decision Act provides:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

---

12 U.S.C. § 1823(e) as it existed prior to the Amendment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989:

No agreement which tends to diminish or defeat the right, title or interest of the corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the corporation unless such agreement –

(1) Shall be in writing;

(2) Shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank;

(3) Shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee;

(4) Shall have been, continuously from the time of its execution, an official record of the bank.

APPENDIX L

MATERIAL EXCERPTS FROM CONTRACTUAL DOCUMENTS INVOLVED:

Excerpt from Commitment Letter of First Texas Savings Association with Griffin and Williams dated June 24, 1985:

> LEGAL JURISDICTION: This Commitment is delivered and is intended to be performed in the State of Texas and shall be construed in accordance with the laws of said State and the laws of the State of Texas shall govern (and the Loan Documents shall so provide).

Excerpt from Guaranty of Griffin and Williams to First Texas Savings Association dated July 11, 1985:

> This Guaranty shall be deemed to have been made under and shall be governed by the laws of the State of Texas in all respects and shall not be waived, altered, modified or amended as to any of its terms or provisions except in writing duly signed by Holder and Guarantors.

Supreme Court, U.S.
FILED
JAN 16 1992
OFFICE OF THE CLERK

(2)

No. 91-809

In The

Supreme Court of the United States

October Term, 1991

JACK GRIFFIN,

Petitioner,

v.

FIRST GIBRALTAR BANK, FSB,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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No. 91-809

In The

Supreme Court of the United States

October Term, 1991

JACK GRIFFIN,

Petitioner,

v.

FIRST GIBRALTAR BANK, FSB,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

First Gibraltar Bank, FSB ("First Gibraltar"),[1] respectfully requests that this Court deny the petition for writ of certiorari of petitioner, Jack Griffin ("Griffin").

STATEMENT OF THE CASE

On or about July 11, 1985, First Texas Savings Association ("First Texas") made a loan to The Village at Spring Park Joint Venture (the "Joint Venture") evidenced

[1] First Gibraltar's parent company is First Gibraltar Holdings, Inc. There are no nonwholly owned subsidiaries.

by a promissory note in the face amount of $5,690,000.00 (the "Note"). (R. 248). The Note was secured by a Deed of Trust and Security Agreement covering certain real property in Dallas County, Texas. (R. 248). Concurrently with execution of the Note, Appellant Jack Griffin ("Griffin") and Worth Williams ("Williams") executed and delivered a Guaranty in favor of First Texas, by which they unconditionally guaranteed the prompt payment of the Note in an amount limited as set forth in the Guaranty. (R. 248). Although Griffin alleges in his Complaint the existence of agreements by First Texas to provide further financing for construction on the property and First Gibraltar did not contest the existence of such agreements for purposes of its summary judgment motion, it is clear that such agreements, if any, were not in writing.

On or about July 25, 1986, the Joint Venture executed a Loan Renewal and Extension Agreement extending the term of the Note, and Williams and Griffin executed a Guarantor Ratification, ratifying and confirming the Guaranty they had executed in July 1985. (R. 249).

On March 17, 1987, after default on the note and commencement of voluntary bankruptcy proceedings, First Texas filed suit in the 116th District Court of Dallas County, Texas, against Williams and Griffin on their Guaranty. The bankruptcy court subsequently modified the automatic stay to permit foreclosure, and on May 5, 1987, the property was sold at a Substitute Trustee's Sale for $3,888,500.00.[2] After allowing all credits and offsets, a

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[2] Although Griffin also alleged in his Complaint that First Texas agreed to bid in the property at a specified price at the

(Continued on following page)

deficiency of $2,178,082.82 remained due and owing on the Note following foreclosure. (R. 250). First Texas continued to pursue its state court action against Williams[3] and Griffin on the Guaranty.

On December 27, 1988, the Federal Home Loan Bank Board ("FHLBB") appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") to serve as receiver for First Texas. (R. 247). On January 26, 1989, the FSLIC removed the First Texas proceeding to district court. Pursuant to a December 27, 1988, Acquisition Agreement, certain assets of First Texas were transferred by FSLIC, as receiver for First Texas, to First Texas Bank, FSB, a newly chartered institution. (R. 247). First Texas Bank, FSB changed its name to First Gibraltar Bank, FSB on January 20, 1989. (R. 247).

Among the assets transferred to First Gibraltar on December 27, 1988, were the Note and the Guaranty, and First Gibraltar has remained the owner of the Note and the Guaranty since acquiring it from the FSLIC. (R. 247).

On or about May 23, 1989, First Gibraltar filed a Plea in Intervention in the district court which was granted on July 3, 1989.

(Continued from previous page)

foreclosure sale and First Gibraltar did not contest the existence of such agreement for purposes of its summary judgment motion, it is clear that such agreement, if any, was not in writing.

[3] Williams also subsequently filed voluntary bankruptcy and was dismissed as a party in this action.

On August 30, 1989, Griffin filed a motion to remand this action to the state court for lack of subject matter jurisdiction. On September 6, 1989, First Gibraltar filed its motion for summary judgment on its claim to collect on Griffin's Guaranty and on Griffin's affirmative defenses and counterclaims. On November 21, 1989, the district court granted Griffin's motion to dismiss his counterclaims against the Federal Deposit Insurance Corporation ("FDIC"), which had succeeded FSLIC as receiver for First Texas. On January 17, 1990, the district court issued its memorandum opinion and order denying Griffin's motion to remand and granting First Gibraltar's motion for summary judgment. Final summary judgment was entered on February 7, 1990, awarding First Gibraltar $1,442,500.00, together with prejudgment interest of $684,673.76 and attorneys' fees of $9,900. (R. 1050-51). On July 15, 1991, the Fifth Circuit affirmed the district court judgment, and Griffin filed his petition for writ of certiorari on or about November 19, 1991.

REASONS FOR DENYING THE PETITION

Contrary to Griffin's argument, this case does not present issues of exceptional importance; it is, therefore, not worthy of review by this Court. This case is no different from the hundreds of claims and defenses filed every day by borrowers and guarantors of failed institutions to avoid repaying loan funds which were admittedly received and used to their own benefit. In his quest for a writ of certiorari, Griffin has not suggested that there is a split in the applicable decisions of the courts of appeals. Indeed, in good faith he could not make such a

suggestion, since the courts of appeals have uniformly applied the *D'Oench Duhme* doctrine to deny precisely the claims and defenses which he asserts here. Furthermore, Griffin's primary arguments on jurisdiction and choice of law have already been decided against him by long-standing decisions of this Court.[4]

I. THIS CASE WAS PROPERLY REMOVED TO FEDERAL DISTRICT COURT.

Griffin attacks the trial court's exercise of jurisdiction on two grounds: (1) the case does not arise under federal law because the proviso of former 12 U.S.C. § 1730(k)(1) applies, and (2) the court of appeals incorrectly applied 12 U.S.C. § 1819 retroactively to cure any defect in the original removal of the case.[5]

With regard first to § 1819, First Gibraltar has been unable to find a circuit court which has declined to apply

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[4] Griffin also raises miscellaneous constitutional challenges to the application of *D'Oench Duhme* to his claims and defenses. However, he never raised these issues in the trial court. *See* Memorandum Opinion and order entered Jan. 7, 1990 (Pet. App. C at 27a-32a). Griffin gives no valid argument why this Court should find the application of *D'Oench Duhme* unconstitutional, and his case presents no circumstances which have not already been encountered by the federal courts in 50 years of interpreting *D'Oench Duhme*.

[5] Section 407 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ("FIRREA") repealed 12 U.S.C. § 1730(k)(1), and Section 209 of FIRREA amended 12 U.S.C. § 1819, which is now the relevant jurisdictional provision. *Triland Holdings & Co. v. Sunbelt Serv. Corp.*, 884 F.2d 205, 207 (5th Cir. 1989).

the provision retroactively. *See, e.g., Kirkbride v. Continental Casualty Co.*, 933 F.2d 729, 731-32 (9th Cir. 1991); *FDIC v. 232, Inc.*, 920 F.2d 815, 818-19 (11th Cir. 1991); *FDIC v. Kasal*, 913 F.2d 487, 493 (8th Cir. 1990), *cert. denied*, U.S., 111 S. Ct. 1072 (1991); *Demars v. First Serv. Bank for Sav.*, 907 F.2d 1237, 1238-40 (1st Cir. 1990); *Triland Holdings & Co. v. Sunbelt Serv. Corp.*, 884 F.2d 205, 207 (5th Cir. 1989). As can be seen from these cases, application of § 1819 to this case is consistent with the controlling standards set by this Court for determining whether a new statute should be retroactively applied in cases where, as here, standards of conduct have not been altered by the statute. *See Bradley v. School Bd. of Richmond*, 416 U.S. 696, 716, 94 S. Ct. 2006, 2019 (1974) (courts are to apply law in effect at time of decision unless doing so would result in manifest injustice). However, this Court does not even need to reach this question to deny Griffin's petition, because the district court had jurisdiction under § 1730(k)(1).

With regard to § 1730(k)(1), it is important to note that, while he complains loudly that the court below incorrectly held that the proviso does not apply in this instance, Griffin never explains how this case fits within both the requirements of the proviso to deny federal jurisdiction. He faults the court of appeals' holding that First Gibraltar, as a newly chartered federal institution, is a non-proviso party, but he ignores the emphasis which the court below places on the conjunction "and" in listing the elements of the proviso. *See* Pet. App. A at 5a. Thus, for the proviso to apply, a case must concern only proviso parties *and* only questions of state law can be involved. His sole argument for the application of state law (which appears in another section of the petition at page 22)

depends on a tortured reading of this Court's opinion in *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 109 S. Ct. 1361 (1989),[6] a reading which is in direct conflict with controlling decisions of this Court predating even *D'Oench Duhme*.

As early as 1940, this Court recognized that "[t]he National Bank Act (12 U.S.C.A. § 21 et seq.) constitutes 'by itself a complete system for the establishment and government of national banks.' " *Deitrick v. Greaney*, 309 U.S. 190, 194, 60 S. Ct. 480, 482 (1940) (citations omitted). The Court concluded:

> A point much discussed in brief and argument, upon the assumption that local law will guide our decision is whether, by Massachusetts law respondent is precluded from setting up the illegality of the transaction as a defense to his note. But it is the federal statute which condemns as unlawful respondent's acts. The extent and nature of the legal consequences of this condemnation though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted. We have recently held that the judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Bank Act involves decision of a federal, not a state question.

309 U.S. at 200-01, 60 S. Ct. at 485 (citations omitted).

Two years later, in the leading case of *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S. Ct. 676 (1942), this Court reaffirmed that federal law applied:

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[6] *See* Pet. App. A at 6a n.2 for the discussion by the court of appeals on the actual holdings in *Coit*.

> The jurisdiction of the District Court in this case, however, is not based on diversity of citizenship. Respondent, a federal corporation, brings this suit under an Act of Congress authorizing it to sue or be sued "in any court of law or equity, State or Federal."[2] Whether the rule of the Klaxon case applies where federal jurisdiction is not based on diversity of citizenship, we need not decide. For we are of the view that the liability of petitioner on the note involves decision of a federal not a state question under the rule of Deitrick v. Greaney, 309 U.S. 190, 60 S. Ct. 480, 84 L. Ed. 694.

315 U.S. at 455-56, 62 S. Ct. at 679 (citations omitted; footnote in original).

The footnote which appears in the middle of the quotation from *D'Oench Duhme*, above, is particularly relevant to this case. Footnote 2 quotes the remaining portion of the Federal Reserve Act as it existed in 1942. That language from the old statute is almost identical to § 1730(k)(1), first, in providing that suits to which the corporation is a party "shall be deemed to arise under the laws of the United States" and, second, in including a proviso that suits which involve "only the rights or obligations of depositors, creditors, stockholders and such State bank *under State law* shall not be deemed to arise under the laws of the United States." 315 U.S. at 455, 62 S. Ct. at 678 n.2 (emphasis added). Furthermore, like First Texas in this case, the bank involved in *D'Oench Duhme* was a state-chartered institution. *See* 315 U.S. at 460, 62 S. Ct. at 680. Thus, Griffin's assertions in this case do not differ significantly from those which the petitioner in *D'Oench Duhme* argued to this Court 50 years ago. The

Court plainly held then that federal law applied, and Griffin has presented this Court with no viable argument that state law should apply in his particular case. *See also Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510, 2514-15 (1988) (citing *D'Oench Duhme* for proposition that some areas which involve "uniquely federal interests" are "so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent *explicit* statutory directive) by the courts – so-called 'federal common law.' ").

Since federal, not state, law applies in this case, Griffin cannot meet the requirement of the proviso that the case must involve *only* state law. Griffin cannot successfully invoke the proviso to defeat removal jurisdiction under § 1730(k)(1) regardless of whether the court of appeals completely expressed its rationale for declining to apply the proviso. There is thus no occasion for certiorari review here.

II. SECTION 1823(e) HAS NOT PREEMPTED *D'OENCH DUHME*.

For 50 years, the *D'Oench Duhme* doctrine has been applied and expanded to effect the federal policy "to protect [the FDIC] and the public funds which it administers against misrepresentations as to the . . . . assets in the portfolios of the banks which [it] insures or to which it makes loans." *D'Oench Duhme*, 315 U.S. at 457, 62 S. Ct. at 679. Griffin seeks to undermine this federal policy and destroy the well-established principles articulated in *D'Oench Duhme* and its progeny by urging this Court to

consider whether 12 U.S.C. § 1823(e) preempts that precedent – something that Congress itself has not seen fit to do in its many revisions to the banking laws since 1942. Griffin cites no cases in support of his argument for statutory preemption of common law which suggest in any way that *D'Oench Duhme* has lost its viability since the passage of § 1823(e). Furthermore, his argument that the Fifth Circuit "recognized that the enactment of § 1823(e) was a codification of the *D'Oench* estoppel" is based on a failure to read all the words which the court below used. The court of appeals stated that the "*D'Oench Duhme* requirement is now embodied *in part* in federal statute." Pet. App. A at 11a (emphasis added). The application of *D'Oench Duhme* is nothing more than the natural development of federal common law in this area of "uniquely federal interest" – a development which this Court has expressly recognized as appropriate. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510, 2514 (1988). If Congress wished to overturn or limit any of the decisions which interpret the principles of *D'Oench Duhme*, it certainly knows how to do so. Since Griffin makes no claim that the lower courts are not uniformly and consistently applying *D'Oench Duhme*, there is no reason for this Court to review this issue.

CONCLUSION

Griffin's petition raises no issue worthy of review. Therefore, First Gibraltar requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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